THIRD QUARTER

2018

Contents

KENTUCKY

PENAL CODE

PENAL CODE – KRS 500 – DEFINITIONS

Brown v. Com., 553 S.W.3d 826 (Ky. 2018)

FACTS: In a complex factual situation, Brown was charged with kidnapping, robbery and the attempted murder of O'Connor. Specifically, Brown assisted others who had already seized

O'Connor in another county. Others transported O'Conner from Hardin County, when the initial crime occurred, to Meade County where Brown stabbed her three times and fled the scene.

Ultimately, Brown was convicted and appealed.

ISSUE: Are stabbing injuries to the lungs a "serious physical injury?"

HOLDING: Yes.

DISCUSSION: The victim died before trial and thus was unable to testify as to the seriousness of the injuries she sustained. The Court noted that under the Kidnapping charge, the penalty was enhanced if there as a finding of serious physical injury. Medical testimony indicated the victim suffered a punctured lung and a pneumothorax, and spent several days in the hospital. Brown argued that although there was the potential for serious complications, O'Connor did not have those complications and made a full recovery from those injuries. The Court held that it was proper for the jury to find that the stabbing, and the pneumothorax, was itself a serious physical injury.

The Court also held that even though the stabbing occurred in Meade County, Brown's trial in Hardin County was proper because much of the event occurred in that county. Although other cited cases resulted in two trials in multiple counties, the Court determined that it was unnecessary to go to that expense. After resolving several other issues, the Court agreed that Brown's convictions were proper.

PENAL CODE – KRS 509 - KIDNAPPING

Malone v. Com., 556 S.W.3d 556 (Ky. 2018)

FACTS: Malone and Pinkston shared an intimate relationship, amicably ended by Pinkston at some point. They remained friends. One morning, Pinkston found Malone sleeping in her car, and she was "not OK" with it, but he rode with her to work. They argued. (Malone complained he had bought the car but it was titled in her name as he lacked an OL.) When they arrived at work, she told him to leave, and a coworker spotted Malone starting to drive off in the car. Pinkston stopped him and told him to leave again. At lunch, he was still sleeping in her car and she told him "that she was sick of him following her, did not want to be with him, and could not be in a relationship at this time, to which Malone responded that he loved her and wanted to be with her." She agreed, however, to drive him to a family member's home.
Upon arrival, he told he was sorry, but then began stabbing her, causing her serious injury. He forced her to stay in the car and to drive. They fought again and finally, Pinkston escaped, but not before Malone bit her in the eye. Malone drove off but was eventually apprehended.

Malone was charged with, among other offenses, kidnapping with serious physical injury. He was convicted of that and other charges, and appealed the kidnapping charge.

ISSUE: When a victim suffers serious physical injury before a kidnapping occurred, may a defendant be convicted of kidnapping with serious physical injury?

HOLDING: Yes.

DISCUSSION: Malone claimed that the kidnapping did not actually begin until the assault because up until then, Pinkston agreed to be in the car with him. It was only after the initial fight that he restrained her. The Court reviewed KRS 509.010's definition of restrain and held that "[w]hen the act is looked at in its totality, the infliction of serious physical injury can be said to be the first step in the kidnapping, because the infliction, coupled with the command to stay put, evidences to a reasonable jury an intent to kidnap—formed before the physical harm occurred—that the defendant acted upon."

In a matter of first impression in Kentucky, the Court held that the jury was properly instructed and that the injuries occurred during the kidnapping. Malone's convictions were upheld.

PENAL CODE – KRS 510 - RAPE

Campbell v. Com., 2018 WL 4627594 (Ky. 2018)

FACTS: Campbell was charged with several sexual offenses involving his 17-year-old daughter, and was ultimately convicted of Incest and sexual abuse. Campbell appealed.

ISSUE: Is continuing after a victim pushes away an assailant "forcible compulsion?"

HOLDING: Yes.

DISCUSSION: With respect to the sexual abuse charge, Campbell argued there was no finding of forcible compulsion. (He had admitted to inappropriately touching her.) The victim, however, had testified that Campbell removed her lower clothing without permission, that she'd told him to stop and had pushed him away. The Court agreed that her objections were sufficient to find forcible compulsion and upheld the convictions.

Caldwell v. Com., 554 S.W.3d 874 (Ky. App. 2018)

FACTS: On July 31, 2015, Caldwell took three siblings, long time family friends, shopping and then offered to "keep them" for the rest of the day, and then for an overnight. The 14-year-old girl later alleged that Caldwell made approaches to her and touched her breasts over her clothing. He grabbed her and kissed her, and she was able to extricate herself and rejoin her younger siblings. She told her parents the next day and her father confronted Caldwell. Caldwell claimed all he did was give her a back rub but admitted he had "messed up."

Caldwell was ultimately convicted of sexual abuse and found to be a position of special trust, which enhanced his penalty. He appealed.

ISSUE: May a family friend be in a "position of special trust?"

HOLDING: Yes.

DISCUSSION: The Court noted that while not all family friends might not be in that position, the decision lay with the jury. The victim had testified that Caldwell was like family, was regularly present, and that she trusted and felt comfortable with him. The victim and her two siblings were spending the night with him as the "adult in charge." The Court held that the jury's finding was properly supported.

Marksberry v. Com., 2018 WL 4263435 (Ky. App. 2018)

FACTS: Marksberry was accused of sodomy and sexual abuse which he performed oral sex on a victim who had been asleep. (She testified she initially believed that the individual was her boyfriend who was in the house, and that she'd been sleeping next to her child.) Marksberry left the home and Moore, the victim, called the police to complain.

Marksberry argued before the trial court that Moore was not physically helpless (to support the sodomy in the first degree charge). He also argued that sexual abuse constituted double jeopardy. The Court disagreed. He was convicted of both charges, and appealed.

ISSUE: Is beginning sexual contact with a victim that is asleep potentially done when they are "physically helpless?"

HOLDING: Yes.

DISCUSSION: The Court looked at the elements of both charges. With respect to double jeopardy, the Court noted it was up to the jury to decide if the sexual touching was separate and apart from the sodomy conduct. With respect to being physically helpless, the Court noted, that commentary suggested that it would include when an individual is "in a deep sleep" because of drug or alcohol use – which the victim had denied. It looked to Boone v. Com., which held that one who is asleep is not able to make a conscious choice.[1] Although she awoke during the assault, the Court agreed that the crime had already occurred.

The Court affirmed his conviction.

PENAL CODE – KRS 514 – THEFT

Marlow v. Com., 2018 WL 3492058 (Ky. App. 2018)

FACTS: In September 2015, a Harlan County home was burglarized and items were taken. In November, Gambrel spotted someone wearing one of his jackets and asked where they had

[1] 155 S.W.3d 727 (Ky. App. 2004).

gotten it. The individual, eventually identified Marlow, indicated he'd paid five beers for it. Gambrel (and Wynn, his girlfriend) reported that information to the police chief, who prepared a search warrant for Marlow's home. Nothing was found in the home but several identified stolen items were found on the back porch, including a laptop that belonged to someone else. Marlow first said he did not own those items, but said he and Wynn bought them from another person.

Marlow was indicted for receiving stolen property and related charges. He was convicted and appealed.

ISSUE: May receiving stolen property still be charged after the prima facie time frame?

HOLDING: Yes.

DISCUSSION: Marlow argued that it was improper to charge him with receiving stolen property because too much time had passed (about two months) between the two events, and this passage of time exceeded the prima facie element of "recently" as stated in the elements. Further, Marlow argued he did not have actual possession of the items. However, the Court held that the time lapse was no so long as to make the charge improper.

The Court also noted that although Marlow did not have exclusive control of the premises – he lived there with his girlfriend and his mother – he had sufficient control and was directly linked to one of the items, the jacket. (Marlow was also properly convicted of tampering as the items were hidden under a sheet of plywood.)

The Court upheld the conviction.

PENAL CODE – KRS 511 - BURGLARY

Williams v. Com., 2018 WL 4183473 (Ky. App. 2018)

FACTS: On November 21, 2014, Williams and his stepfather (Hopkins) came to Lexington from Detroit to visit Dejuan's occasional girlfriend, Joi. Joi and Williams made several trips for groceries and other items. After dinner, they enjoyed beer and cognac and then went bowling. The evening took a turn for the worse when the talk came back to the relationship between Williams and Joi. Upon their return to Joi's apartment, the three got into a physical altercation in the parking lot. Joi ran to her apartment, locked herself in, and tried to find her phone to call for police.

Hopkins managed to break in her door and Joi grabbed a knife, yelling at the two men to leave. Hopkins bear-hugged her and Williams began beating her. Joi got away, still with the dull knife she had grabbed, and banged on a neighbor's door. She ran to the lot and the fight continued with a struggle over the knife, which Hopkins finally tossed away. Williams began biting her and,

finally, the two men let go and left. A neighbor came to Joi's aid and the police arrived. Joi was transported for treatment and photos were taken.

Williams returned to Detroit and called the Lexington PD. He claimed he'd been in verbal fight with Joi when she pulled a knife and that he was cut in the process. Williams was charged with burglary and assault and convicted. Williams then appealed.

ISSUE: Does a locked door indicate a withdrawal of permission to enter?

HOLDING: Yes.

DISCUSSION: Among other issues, Williams argued that the burglary element was not proven. The Court examined the charges as well as Williams's assertion that he was Joi's guest, that his belongings were inside, as were Hopkins's car keys. The Court held that even if Williams "had permission to be in the apartment at one time does not mean that he had permission to be in it for all time." The Court held Joi withdrew her permission by locking the men out. Further, Williams's actions just prior to entering the door (broken by his uncle) indicated he intended to commit a crime inside – continue his assault. The fact Williams was not separately charged with another assault inside the apartment is immaterial. The Court held the burglary charge was appropriate and upheld his conviction.

PENAL CODE – KRS 520 – ESCAPE

Rice v. Com., 2018 WL 3414214 (Ky. App. 2018)

FACTS: In May 2014, Rice was an inmate of the Knox County Jail when he was taken to the hospital under guard. Sometime after his catheter was removed by hospital personnel, Rice asked Deputy Jailer Smith for permission to use the toilet. Smith allowed it. When Rice emerged from the bathroom, Smith saw that Rice had removed his IV and was bleeding. As Smith was donning gloves, Rice took off running and a chase ensued. After a scuffle where "Rice came out of his shirt," Rice was able to get away. Rice was not located for several months.

Rice was indicted for first-degree escape, third-degree assault and being a PFO. He was convicted and appealed.

ISSUE: Is a "scuffle" enough to justify force for purposes of an escape charge?

HOLDING: Yes.

DISCUSSION: Rice argued that the use of force element in First-Degree Escape and Assault was not proven. The Court held that the testimony was more than sufficient to so prove and upheld his conviction.

PENAL CODE – KRS 524 – TAMPERING

Weatherly v. Com., 2018 WL 4628570 (Ky. 2018)

FACTS: While airing up a tire, Trooper Hale noticed Weatherly and Brady at a Fulton County gas station. The trooper could smell marijuana when Weatherly got out of a vehicle. Weatherly went inside and told Brady to hide a pill bottle inside her vagina, assuming the trooper would talk to him. Trooper Hale spoke to Weatherly and Weatherly told him that he did not have any other drugs in the truck. Brady was stopped and admitted to being high on methamphetamine. Since she was driving, Brady was arrested. Brady was unable to sit in the cruiser and ultimately withdrew the bottle, which contained various drugs. Brady received diversion in exchange for her testimony.

Weatherly admitted to smoking marijuana and consented to a search of the truck. A pistol and shotgun were found inside, and marijuana was found under the passenger side of the truck. Weatherly admitted he tossed it there. He was charged with a variety of offenses, including tampering. He was convicted and appealed.

ISSUE: Does inducing someone to hide drugs constitute tampering?

HOLDING: Yes.

DISCUSSION: The Court held that he was properly charged with tampering because he induced Brady to hide the drugs to avoid prosecution. In fact, Trooper Hale testified he saw the pill bottle before Weatherly gave it to Brady to conceal.

The Court also held that Weatherly was in constructive possession of both firearms and thus a penalty enhancement was appropriate. There was a sufficient nexus between the firearms and the drugs.

The Court upheld his convictions.

PENAL CODE KRS 527 – CONVICTED FELON

Thomas v. Com., 2018 WL 3414207 (Ky. App. 2018)

FACTS: In February 2016, Thomas was the victim of a burglary in McCracken County, during which he identified members of the Shumpert family as the perpetrators. (Thomas was also assaulted during the break-in.) Several months later, Paducah officers responded to a fight at a local mall. Thomas, the victim, explained that members of that same family had punched him and mall security intervened. Later that evening, gunfire was reported near the home of one of the Shumperts and a witness spoke of a vehicle with two passengers that drove past just before she saw a gun and heard a couple of gunshots. Another witness saw the gun pointed out of the car window and she got to the ground. Sheila Shumpert, the residence owner, was interviewed

and told the officer that Thomas was driving and identified the vehicle. A photo from Thomas's phone showed his girlfriend (who fit the description of the female passenger) standing next to a vehicle that matched the description (a gold Ford Taurus).

Thomas, upon being questioned, denied having a gun or being the person that fired the gun at the residence. However, a further examination of his phone revealed images of a gun and text messages about guns and ammunition. Thomas attempted to prove an alibi with his sister and mother.

Thomas was convicted of possession of a firearm as a convicted felon and appealed.

ISSUE: Is evidence of prior possession of a gun and photos of the individual with a gun, enough to support a possession charge?

HOLDING: Yes.

DISCUSSION: At trial, Thomas's counsel objected to introduction of testimony about the prior burglary investigation as an explanation as to why witnesses might have recanted their initial statements in which they identified Thomas. The court agreed that the burglary gave context to the relationship between the parties and provided a motive for his possession of a firearm. As such, the Court agreed it was proper to introduce the evidence. The Commonwealth had dismissed a wanton endangerment charge but, Thomas argued, spent a good part of the trial proving that charge (the actual shooting). Instead, Thomas argued, evidence should have been limited to the witnesses seeing a gun.

The Court held that although a gun was never recovered, it was appropriate to enter evidence about Thomas being seen with a gun, and with the images on the phone. As such, the introduction of the related evidence was not harmful to the allegation. Thomas' conviction was affirmed.

FORFEITURE

Com. v. Olinger, 2018 WL 3814609 (Ky. App. 2018)

FACTS: Olinger was convicted on robbery charges in Perry County, a crime in which he used a gun. It was recommended during a plea bargaining agreement that Olinger forfeit both the gun and the vehicle, and pay restitution. He entered a guilty plea to second-degree robbery. The Commonwealth moved for an order of forfeiture and disposition with the vehicle requested to be awarded to the Hazard City Police. Olinger opposed the motion. The Court denied the Commonwealth's motion on the vehicle, but agreed to the other conditions. The Commonwealth appealed.

ISSUE: Is forfeiture appropriate in a robbery offense?

HOLDING: No.

DISCUSSION: The Commonwealth argued that KRS 514.130(1) did not limit the forfeiture of personal property exclusively to those crimes defined in that chapter, but "allows forfeiture in other crimes where theft is a necessary element of the offense, such as robbery." The Court noted the need to strictly construe the language of the statute and because of the language contained in 514.130(1), the Court agreed that Olinger was not convicted of any crime under theft. The Court noted that the "redress the Commonwealth seeks should be made through the legislative branch, as it would require a modification of the statute at issue," something the courts are not "permitted to do."

The Court affirmed the denial of the forfeiture.

RESTITUTION

Jackson v. Com., 2018 WL 4378722 (Ky. App. 2018)

FACTS: Jackson was accused of damaging his former girlfriend's vehicle when he attempted to flee from the house after an argument. The vehicle was found in another state, which required it to also be brought back to Kentucky from where it had been impounded. Brooks, the girlfriend, paid almost $1300 to recover the vehicle, not including the actual physical damages of just over $800. Of the latter, Brooks elected to pay out of pocket as it was less than her deductible. Because of the long delay between the incident and the trial, however, Brooks lost that documentation. Her carport was also damaged, with an informal estimate of $400, but she had not yet made those repairs.

Of the $2400 claimed, the trial court awarded restitution of approximately $1800, removing an insurance fee for the vehicle transport and the unrepaired damage to the carport. Jackson appealed.

ISSUE: Is restitution for unrepaired damage appropriate?

HOLDING: No.

DISCUSSION: The Court agreed that the trial court had carefully analyzed the claims and made a proper determination. The Court upheld the restitution.

DOMESTIC VIOLENCE

Ticke v. Cabrera, 2018 WL 3814760 (Ky. App. 2018)

FACTS: Ticke and Cabrera were in a long-term relationship and had three children. They separated in January 2017. In December 2017, Cabrera filed for an EPO, claiming verbal and physical abuse. At the hearing, Cabrera testified that she did not fear serious injury, but stated Ticke is "very aggressive when he is angry." In the past, he had thrown items at her and the police had responded to several situations. She shared text messages Ticke had sent, which were "ranting and obscene." Ticke denied most of the claims, claiming he only hit her car window once when he saw her with "multiple guys" smoking marijuana. Ticke admitted another encounter at a bar, when he claimed he was upset that she was "out" and that she should have told him so he could have picked up the children. He excused the language in the text message as provoked by Cabrera who also called him names.

The trial court concluded that domestic violence had occurred and might occur again. He was restrained from unlawful contact with a DVO. Ticke appealed.

ISSUE: Is aggressive behavior an indicator of future domestic violence?

HOLDING: Yes.

DISCUSSION: Ticke argued that none of his behavior created any true fear of injury or sexual assault. The Court looked at the definitions in the KRS and the listed behaviors. The Court noted that jealousy, by itself, is not domestic violence, although it might lead to violent behaviors. The court noted that the behaviors listed were certainly predictive of the "risk of future violence"

The Court affirmed the DVO.

Jeffries v. Meagher, 2018 WL 3815049 (Ky. App. 2018)

FACTS: In November 2017, Meagher requested a temporary Interpersonal Protective Order (IPO) against Jeffries in Oldham County. She alleged Jeffries been her boyfriend 18 years before, and just a few weeks before, Jeffries starting texting her "troubling" messages. The trial court awarded the TIPO noting dating violence and stalking. At the subsequent hearing, Meagher testified about contact they had in 2010, after Meagher had expressed her condolences about the death of one of his family members. Jeffries contended that his 2017 response was due to that and that he just received the (online) message.

The court entered a no-contact IPO. The family court entered an order that did not make a finding with respect to stalking, however. Jeffries appealed.

ISSUE: May a relationship of many years before still be considered in the issuance of an IPO?

HOLDING: Yes.

DISCUSSION: The Court agreed that although not in a current relationship, the parties had been in a dating relationship at one point, and all interactions flowed as a result of the prior relationship. The Court held that Jeffries's conduct was consistent with stalking, as he continued to message Meagher after she told him to stop. Jeffries referred to weapons as well. The Court upheld the issuance of the IPO.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

Applegate v. Com., 2018 WL 4369364 (Ky. App. 2018)

FACTS: On May 12, 2014, Campbell County Police received a report of car chase involving a gun. Officer Lakes (Campbell County PD) spotted the vehicle and executed a traffic stop. Applegate was driving. Officers learned Applegate had an outstanding warrant. Backup officers spotted a handgun in a seat pocket and methamphetamine in plain view. Applegate was arrested on the warrant and on drug charges. Additional items, such as cell phones, a tablet computer and a digital camera were found.

Officer Lakes obtained a search warrant for the two phones and the tablet, both of which were examined forensically. Agent Oergel, ATF, discovered both devices had SIM cards. Agent Oergel discovered photos of a methamphetamine cook in the phone. In looking at the files, however, he also found child pornography. That information was given to Officer Lakes, who then sought a warrant for the digital camera. No evidence was found on the digital camera. A third warrant was used to delve into the devices and more evidence was found.

Applegate was charged with drug offenses, firearms offenses and child pornography. He moved to suppress the items found pursuant to the search warrants. After a hearing, the Court denied the motion to suppress. Applegate entered a conditional plea on the child pornography charges and appealed. (The other charges were subject to an unconditional plea.)

ISSUE: Does a warrant for an electronic device need to specifically mention the storage media?

HOLDING: No (but as a matter of best practice, it should).

DISCUSSION: Applegate's appeal focused on the validity of the first warrant, and that "the search exceeded the stop of the search warrant," that there was insufficient nexus and that the officers engaged in a "general" search. With respect to the first, he argued that the warrant was limited to communications, not images or video, and that the failure to list the memory card in the tablet invalidated it. The Court agreed that the warrant, "although inartfully drawn," authorized a search for images and video of drug trafficking and that the memory card was

included. His argument as to generality, as the officers looked at all files, but they could not determine the contents without opening them.

With respect to the nexus issue, again, the warrant could have been more thorough, but it did provide sufficient relevant information to justify its issuance. Although not necessary, the court agreed as well that good faith would have cured any alleged defects in the warrant.

The Court affirmed the conviction.

SEARCH & SEIZURE – PROTECTIVE SWEEP

Miller v. Com., 2018 WL 4054851 (Ky. App. 2018)

FACTS: On January 13, 2016, four U.S. Marshals were executing a federal arrest warrant on Martin in Madison County. Martin was taken into custody and placed in handcuffs in the house. Martin was questioned about a woman outside, who claimed to be waiting for "Hot." Martin agreed that was his alias, but he did not know the woman. Martin's wife and child were also present, but he denied anyone else was in the house. The marshals did not believe that statement because they had intercepted someone else who tried to flee the residence through the back but retreated inside. The marshals elected to do a protective sweep and found Miller, who claimed to be on parole. One of the deputy marshals knew that the parole officer named by Miller only handled inpatient cases and this apartment was not a proper facility for that purpose. The marshals continued the sweep, including the bedroom where Miller was found, and glanced behind a piece of furniture that had been pulled away from the wall. Seeing a bag of narcotics, they stopped and called a local officer to the scene.

Det. Boyle, Richmond PD, arrived. Det. Boyle questioned Miller, who admitted he tried to climb out the window and then tossed the drugs (cocaine) into the hiding place. He was charged with trafficking.

Miller moved for suppression, arguing the search was improper. The suppression motion was denied. Miller entered a conditional plea and appealed.

ISSUE: Are the facts needed to justify a Buie search required to meet the same standard as Terry?

HOLDING: Yes

DISCUSSION: Miller argued the protective sweep was improper and should have stopped once he was in custody. The Court looked to Maryland v. Buie[2] and Guzman v. Com.[3] The Court noted that this situation would fall under the second type of Buie search, which was first described in

[2] 494 U.S. 325 (1990).
[3] 375 S.W. 3d 805 (Ky. 2012).

Kentucky in Brumley v. Com.[4] In that type of Buie search, which is a broader search than the first, officers must give articulable facts that suggests a "reasonably prudent officer" to believe there might be someone at the scene that poses a hazard. It must be based on specific facts and rational inferences, which is the reasonable suspicion standard of Terry. In this case, the Court agreed, the officers were justified in first believing someone else was in the house, despite Martin's denials, and second, believing that Miller might not be the only person present, as they could not trust the parties that were present having already caught them in a lie. Although the officers glanced behind a piece of furniture, it was sitting some inches away from the wall and it was certainly possibly someone could be hiding behind it.

The Court upheld Miller's conviction.

SEARCH & SEIZURE – HOME

Suarez v. Com., 2018 WL 3414372 (Ky. App. 2018)

FACTS: On or about December 1, 2015, officers with several agencies, including Nicholasville PD and Lexington PD, were working a joint drug task force investigation. Sgt. Crouch (Nicholasville PD) communicated with Det. Page (Lexington) that Suarez had outstanding warrants and was living in Lexington, and Det. Page initiated a surveillance on the home. On December 1, officers observed a group of people leaving the residence, one of whom was Suarez, and he and a female drove away in a black SUV. The officers followed the vehicle for a short distance and attempted a traffic stop, but Suarez fled. Officers quickly terminated the pursuit for safety concerns. They patrolled for a short time and then returned to the residence. No vehicles were there at the time, but they thought Suarez may have returned and approached the home.

Upon knocking, Davidson answered and allowed officers inside. He explained Suarez had been renting a room in the basement for several weeks. Davidson did not think Suarez had returned but explained there was a separate outside entrance and Suarez could have come in. Davidson took the officers downstairs and pointed out Suarez's room. Det. Page tried to open the door and Davidson expressed surprise that it was locked because it was "never locked." Det. Page believed Suarez was inside the room and manipulated the lock to enter. Inside, in plain view, Det. Page saw several incriminating items. Det. Page obtained a warrant and found a quantity of methamphetamine, heroin, marijuana and pills, and related items.

Suarez was arrested several months later and charged with trafficking and gun charges. He moved for suppression of the items found in his room. Although the Court agreed it was close, the Court denied the motion to suppress, finding offices had probable cause and exigent circumstances to enter.

Suarez entered a conditional guilty plea and appealed.

[4] 413 S.W.3d 280 (Ky. 2013).

ISSUE: Is speculation by law enforcement that an individual is behind a locked door sufficient to justify forcing a lock open to enter a residence?

HOLDING: No.

DISCUSSION: The Court looked to the standard for a search of a home. The Commonwealth had changed their argument to basing the entry on the warrants, but the Court noted that there were two prongs to New York v. Payton, and that there was "no reason to believe Suarez was inside the room" at the time, but only speculation by Det. Page. Although the standard is less than probable cause, it still requires at least some proof of the individual's presence. There were "possibilities, not reasons." The locked door, the Court held, was more indicative of an empty room rather than an occupied one. There were no sounds heard inside and his vehicle was not present.

The Court held that there was no justification in forcing the lock and suppression was appropriate. The Court vacated his plea and remanded the case.

SEARCH & SEIZURE - CONSENSUAL

Colson v. Com., 2018 WL 3814607 (Ky. App. 2018)

FACTS: On November 11, 2015, a caller (Kayla) reported an individual with a gun at a gas station. She described the suspect's clothing and provided a phone number for call back. Officer Sewell (Newport PD) and a second officer were dispatched and arrived in minutes. They spotted Colson, who matched the description and was carrying two gym bags. Both officers approached Colson on foot and identified themselves. Colson initially denied having a gun, but then admitted to possessing a handgun. Officer Sewell told him that having a gun was not necessarily illegal and Colson permitted a search. The gun was discovered during the search. Colson admitted he had no CCDW and had been "in trouble" before. Colson was confirmed to be a convicted felon and arrested. Drugs were also found on his person at the jail.
Colson was charged with various offenses and moved to suppress, arguing it was an illegal Terry stop and that the "anonymous informant" was not reliable enough to support the stop. The trial court concluded that the interaction was consensual and denied suppression. Colson entered a conditional guilty plea and appealed.

ISSUE: Is a consensual interaction lawful?

HOLDING: Yes

DISCUSSON: The Court noted that "there are three types of interaction between police and citizens: consensual encounters, temporary detentions generally referred to as Terry stops and arrests."[5] In this case, the Court agreed that the initial encounter was consensual, as he was

[5] Baltimore v. Com., 119 S.W.3d 532 (Ky. App. 2003).

questioned in a public place and no force was used. Officer Sewell spoke to him and provided information about firearms. The Court determined that everything "flowed from a consensual encounter" and as such, the issue of the caller was immaterial.

Colson's conviction was affirmed.

SEARCH & SEIZURE – PLAIN VIEW

McBride v. Com., 2018 WL 3699849 (Ky. App. 2018)

FACTS: On April 1, 2015, several Lexington police officers went to arrest McBride. The homeowner directed the officers to McBride's rented room; he knew McBride by a different name. Officers spotted McBride inside and took him into custody. The officers also saw 18 marijuana plants and contacted Det. Page of Lexington PD's narcotics unit. Det. Page saw heat sealed bags, and a later investigation revealed large quantities of controlled substances in the form of pills. The bags were not transparent, however, and it was difficult to discern their contents by sight.

McBride was charged and ultimately entered a conditional Alford plea and appealed.

ISSUE: Is a reasonable inference as to whether an item is contraband enough for plain view?

HOLDING: Yes.

DISCUSSION: McBride argued that the evidence in the partially obscured bags (which contained the bulk of the pills for which he was charged) should have been suppressed. The Court noted that based upon what Det. Page could clearly see, the plants and some of the pills, it was reasonable to believe that the other bags also contained contraband as well. As such, it was enough to find that the incriminating nature of the bags was immediately apparent under the plain view doctrine.

The Court affirmed the plea.

SEARCH & SEIZURE – TRAFFIC STOP

Perkins v. Com., 2018 WL 4263487 (Ky. App. 2018)

FACTS: Officer Baker (Lexington PD) was dispatched to an address concerning subjects "being loud and selling narcotics." Officer Baker saw Perkins standing outside, and then observed Perkins walk to and enter a vehicle. Officer Baker believed Perkins was attempting to avoid making eye contact with him, so he approached the vehicle on foot before the driver's door could be closed. Officer Baker immediately spotted crack cocaine in a baggie.

Perkins was seized, frisked and given Miranda. Perkins denied any knowledge of the contents, which field-tested positive for cocaine. Upon arrest, the officer found synthetic marijuana in Perkins's pocket. At a hearing, the Court ruled that the officer was sent in response to an anonymous tip, which provided no description. The trial court determined that the officer could approach Perkins, but could not detain him. However, once the officer spotted the drugs, with the aid of his flashlight, the officer had a reasonable, articulable suspicion to continue the investigation.

Perkins was convicted and appealed.

ISSUE: May a tip be used to get officers to a location, even if insufficient to use for further action?

HOLDING: Yes.

DISCUSSION: The Court held the trial court was correct, and that the officer handled matters appropriately. Even though the tip was anonymous, not truly corroborated, nor provide any predictive information, the tip was sufficient to cause Officer Baker to go to the location and contact Perkins. Further, the Court determined the drugs were in plain view.

The Court affirmed Baker's conviction.

Phillips v. Com., 2018 WL 4377741 (Ky. App. 2018)

FACTS: On August 25, 2015, Trooper Mirus (KSP) received a call from a detective from a local sheriff's office asking if he knew Phillips. The detective believed Phillips was selling drugs in the area. Trooper Mirus confirmed an active warrant for Phillips for driving on a suspended OL. Trooper Mirus headed to the location and spotted Phillips driving away. He stopped Phillips, arrested him and placed him in handcuffs. Trooper Mirus squatted down and looked through the open driver's side door but saw nothing. He then opened the passenger side door and even looked under the seat. Phillips asked that Trooper Mirus to obtain his cigarettes from the consoled of the vehicle so he could smoke, and Mirus did so. In one of the two packs, he heard a rattle and found a single oxycodone pill. Trooper Mirus then searched the vehicle and found additional pills in the car.

Phillips was charged with several offenses, including possession of a controlled substance. He moved to suppress and was denied, with the trial court concluding that his request for his cigarettes was consent to search. Philips entered a conditional guilty plea and appealed.

ISSUE: Is asking for an item inside a vehicle consent for the officer to enter the vehicle?

HOLDING: Yes.

DISCUSSION: Phillips first argued that opening the passenger side door violated Arizona v. Gant. The Court agreed with this argument because Phillips was secured away from the car at the time and there was no reason to believe there was evidence of the crime of arrest (the suspended OL) in the vehicle. However, nothing was found during that search anyway. The crucial question was whether his request for the trooper to retrieve his cigarettes from the vehicle constituted consent, and the Court agreed it did. Phillips asked specifically for his own cigarettes (rather than a cigarette) and he had no cigarettes on his person. His "spontaneous, unprompted request" clearly indicated a request for the trooper to enter the vehicle.

Further, Phillips was not coerced by the prior improper search when he asked the trooper to again enter the vehicle. Phillips argued that the "nature of the pill inside the cigarette pack was not immediately apparent," and that the trooper was wrong to open the pack. The Court noted that the item inside was clearly not a cigarette and any "unknown physical object" could pose a hazard and should be investigated.[6]

The Court affirmed the conviction.

Preston / Booth v. Com., 2018 WL 3493105 (Ky. App. 2018)

FACTS: On August 10, 2015, Berea police were waiting near the Greyhound bus station on an anonymous tip that a well-described male would be arriving from Detroit with drugs. This was consistent with other tips they had received. Booth emerged and fit the description, accompanied by Hughes, and they had only a backpack between them. Preston picked them up. Police followed Preston's vehicle, observed traffic violations, and made a stop. The two passengers "stared straight ahead," not looking at the officer, which the officer found "highly unusual." He obtained identification. Hughes had no identification and gave a different name, but she did not match the description of the person whose name she provided.

The driver was given a warning, and was asked for consent to search. The driver granted consent, but that was not noted in the report. A K9 sniff resulted in an alert but no drugs, and the backpack contained only male clothing. Hughes ultimately confessed to having provided a false name. She was very upset, and as they were pursuing the investigation into her real name, she confessed to having drugs concealed in her vagina. Oxycodone and heroin were ultimately retrieved. Officers obtained a search warrant for Preston's and Booth's phones and incriminating evidence was found consistent with drug trafficking, which also led to a fourth suspect.

All were indicted. Booth and Preston moved to suppress, arguing that the traffic stop was improper. When that motion was denied, both entered conditional guilty pleas and appealed. Both appealed.

ISSUE: May a stop be extended when the officers are given false information?

[6] U.S. v. Robinson, 414 U.S. 218 (1973).

HOLDING: Yes.

DISCUSSION: Both argued that once the stop was completed, they should have been free to leave, complaining that trying to get an identification from Hughes was improper. They further argued that even if consent was given, they should have been permitted to leave immediately and that the delay that resulted in the realization of Hughes' false name was improper. The Court agreed the stop was made under Terry. Although the Court determined that you cannot detain a passenger simply to obtain ID for a warrant check,[7] the additional behaviors observed by the officers, coupled with the anonymous tip, was in fact enough to justify a Terry stop. Specifically, the Court noted that anonymous tips that contain "details predicting future behavior" indicates that "the tipster had insider knowledge."[8] In Stewart v. Com.[9] and Henson,[10] the Court contrasted situations and agreed that in this case, the officers had "specific predictive details of future behavior." Although probable cause dissipated when nothing was found, the officers still had reasonable suspicion that the trio were involved in illegal conduct. In fact, their suspicion only increased as additional details were developed.

The Court affirmed the convictions.

SEARCH & SEIZURE – TERRY

Abney v. Com., 2018 WL 4189557 (Ky. App. 2018)

FACTS: On August 22, 2016, an employee of a Nelson County convenience store saw a man (Abney) approaching customers and asking for a ride. Upon talking to him, the employee learned the man wanted a ride to Bowling Green and had been sleeping outside the store. Abney told the store owner who called police, and identified the man was inside the store.

Deputy Sheriff Lewis responded and noted that there was a "lookout" for a man who bore the same description. Abney was leaving the store at the time and the deputy approached and tried to talk to him. Abney took off running and, ultimately, they scuffled and rolled down a bank. Abney got away but was arrested some months later, having been indicted for fleeing and evading 1st and resisting arrest. Abney was convicted with the former charge being reduced to 2nd degree fleeing and evading. Abney appealed.

ISSUE: Is a BOLO and unprovoked flight sufficient to trigger a foot pursuit?

HOLDING: Yes.

[7] Turley v. Com., 399 S.W. 3d 412 (2013)
[8] Florida v. J.L, 529 U.S. 266 (2000); Alabama v. White, 496 U.S. 325 (1990).
[9] 44.S.W. 3d 376 (Ky. App. 2000).
[10] Henson v. Com., 245 S.W. 3d 745 (2008).

DISCUSSION: The Court looked first at whether the deputy had at least reasonable suspicion that Abney had committed a crime. Deputy Lewis testified about the BOLO and that, combined with his "unprovoked flight" was enough to satisfy that requirement.

With respect to resisting arrest, Abney argued that, at most, he committed flight and passive resistance. Both charges were affirmed.

Kleem v. Com., 2018 WL 3493099 (Ky. App. 2018)

FACTS: On September 7, 2015, Deputy Stidham (Boone County SO) responded to a traffic accident and found Kleem sitting in the grass nearby. Kleem had been the driver of the vehicle involved in the accident. Kleem appeared intoxicated and smelled of alcohol. The deputy requested EMS as it appeared Kleem struck her head. She became aggressive with the EMS personnel and they suggested she might have a head trauma. As she was being prepared for transport, she requested her purse, which an EMS crew member laid on her chest. Deputy Stidham, concerned about her behavior, searched it for a possible weapon, but found cocaine instead. She was taken to the hospital.

Deputy Stidham then charged Kleem with DUI, trafficking and related offenses. She moved to suppress, arguing the search of her purse was improper. When that motion was denied, Kleem entered a conditional guilty plea to trafficking and the DUI charge was dismissed. She appealed.

ISSUE: Does a proper seizure necessarily allow a search of the same item?

HOLDING: No.

DISCUSSION: Kleem argued that the search of her purse was improper because it did not meet any of the exceptions. The trial court had justified the search under safety reasons. The Court reviewed it under the principles in Terry, looking at Frazier v. Com. and Com. v. Banks, specifically.[11] The Court divided the assessment into two parts, the seizure and the search. The Court agreed that seizing the purse was a reasonable precaution because the officer was entitled, even expected, to ensure the safety of the EMS personnel. However, once he had the purse in his possession exigent circumstances no longer existed to support any search of the purse because any safety concerns had been eliminated.

The Court reversed the trial court and remanded the case.

INTERROGATION

White v. Com., 2018 WL 4682487 (Ky. App. 2018)

[11] 406 S.W. 3d 448 (Ky. 2013); 68 S.W.3d 347 (Ky. 2001). See also Adkins v. Com., 96 S.W.3d 779 (Ky. 2003).

FACTS: On September 23, 2015, White had sex with an intoxicated woman in a hotel hallway in Louisville. That led to an investigation by LMPD, which identified White as a suspect. Detectives sought out White for questioning, and found him sitting in a van at his home, smoking marijuana. White identified himself with his brother's name. Det. Benton told White she was not interested in the drug use but was there on another matter. White gave his correct name. He agreed to be questioned and for the conversation to be recorded. He admitted the sexual encounter and was ultimately arrested. Both officers were in plainclothes with weapons concealed.

White was indicted for rape, for having sex with a physically helpless person. He moved to suppress, arguing he had not been given Miranda, which was accurate. The Court denied the motion, finding he was not in custody. He entered a conditional plea to Rape 2nd and appealed.

ISSUE: Is being interviewed in one's own vehicle custodial?

HOLDING: No.

DISCUSSION: The Court agreed that the circumstances clearly indicated that he was not in custody. Relevant factors in such a determination "include the following: the threatening display of several officers, the display of a weapon by an officer, use of threatening language or tone of voice, place of the questioning, length of questioning, whether the suspect was informed the questioning was voluntary and they were free to leave, and whether the suspect initiated contact with the police or voluntarily admitted the police into their residence to answer questions."[12]

Under the circumstances of the case, the Court held that White did not need to be advised of his Miranda rights, and affirmed his conviction.

Brank v. Com., 2018 WL 3595989 (Ky. App. 2018)

FACTS: On June 19, 2016, Officer Meredith (Henderson PD) responded to a burglary. Brank was identified as the likely perpetrator. During the investigation, the officer learned that a supervisor had stopped a vehicle matching that of Brank's nearby, and Officer Lucas went to that location. Officer Lucas confirmed the passenger was Brank and that he met the physical description provided by the victim. Brank was arrested.

That night, Brank, who appeared to be under the influence, was medically assessed. He was determined to need emergency treatment and Deputy Jailer Shields transported Brank to the ER. When the nurse asked if he'd swallowed anything, Brank refused to answer as "he did not want to incriminate himself." Shields advised he should tell the nurse or he might die. He finally admitted he swallowed methamphetamine. He was given treatment which induced vomiting, and the vomit was found to contain methamphetamine.

[12] Smith v. Com., 312 S.W. 3d 353 (Ky. 2010).

Brank was charged with tampering with physical evidence. He moved to suppress, arguing he was "too intoxicated to knowingly and voluntarily waive his right to remain silent." Deputy Jailer Shields admitted he did not advise Brank on his Miranda rights as that was not part of his usual duties. He did say that Brank appeared to understand everything he was told, however. The Court denied the motion to suppress and Brank was ultimately convicted. (As a PFO, he received an enhanced sentence.) Brank appealed.

ISSUE: Is cautioning someone about the consequences of reporting drug intoxication interrogation?

HOLDING: No.

DISCUSSION: The Court first addressed the Miranda issue. It was undisputed that Brank did not receive Miranda warnings and that he had invoked his right to remain silent. However, the Court noted, neither the nurse (not a state actor) nor the deputy jailer interrogated him. Brank argued that under Welch v. Com., he still should have been given Miranda.[13] The Court held, however, that simply placing him in the care of the nurse did not make her a state actor for these purposes. The Court further held that Deputy Shields' admonition was not the "functional equivalent of express questioning" The Court noted that his statement would not necessarily lead to charges, as use is not technically illegal, and that the deputy jailer would not necessarily appreciate that it might lead to an admission of tampering.

The Court affirmed his conviction.

Renn v. Com., 2018 WL 4628573 (Ky. 2018)

FACTS: Renn was originally charged with incest involving his daughters in 1972. The case was dismissed, apparently because the children moved out of state. In 2012, one of the girls, Beverly, asked Jefferson County authorities to follow up on the case. Det. Williams met with Renn and Renn provided some information. Renn was indicted in 2015 on multiple counts involving sexual offenses. At trial, the Commonwealth was allowed to ask questions "about Renn's pre-custodial, pre-Miranda silence to questions related to the sexual abuse allegations brought up in Renn's interview with Det. Williams." Both girls testified. Various detectives also testified, as it had been assigned to at least three different detectives while the case was under investigation between 2012-15.

Renn was convicted on sexual offense charges involving one sister, but acquitted on charges involving the other. He appealed.

ISSUE: May one pre-invoke one's right to remain silent prior to custodial interrogation?

HOLDING: No.

[13] 149 S.W. 3d 407 (Ky. 2004). See also Estelle v. Smith, 451 U.S. 454 (1981).

DISCUSSION: Renn argued that he asserted his right to remain silent during his interview. The Court noted that "because Renn was not subjected to a custodial interrogation, any assertion of his right to remain silent did not require Det. Williams to cease any questioning."

The Court continued:

> Independent of the requirements for Miranda warnings, a suspect has the right to be free from compelled self-incrimination as granted in the Fifth Amendment and applicable to the states through the Fourteenth Amendment. "The giving of a Miranda warning does not suddenly endow a defendant with a new constitutional right. The right to remain silent exists whether or not the warning has been or is ever given. The warning is required not to activate the right secured, but to enable citizens to knowingly exercise or waive it."[14] The invocation of the right to remain silent is not required to be formal.[15] Even so, the assertion must be unequivocal.[16]
>
> Further, the court noted, that right to silence could be waived. The trial court had permitted the prosecution to "use a defendant's pre-arrest, pre-Miranda silence as substantive evidence of guilt based on holdings in Salinas v. Texas and Bartley v. Com."[17] The Court noted that its precedent, set in Baumia, that "where a defendant invokes her right to remain silent, arising out of official compulsion, defendant's pre-arrest, pre-Miranda invocation of her Fifth Amendment right may not be used in the Commonwealth's case-in-chief.[18] " The appellate court agreed and maintained that "an accused's selective silence is protected and the Commonwealth may not use an accused's pre-arrest/pre-Miranda silence (when the right to remain silent is invoked) as substantive evidence of guilt."

The Court reviewed the statements made by Renn and determined that he asserted his right to remain silent, but further noted that it was harmless. In fact, Renn was not "silent" during the interview and that his "utterances of words normally indicative of invocation of the right to remain silent, without execution in the invocation of the right, do not suffice. Any inference the jury gleaned from the interview was properly provided to it."

The Court affirmed his convictions.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – INFORMER PRIVILEGE

[14] Green v. Com., 815 S.W.2d 398, 400 (Ky. 1991).
[15] Buster v. Com., 364 S.W.3d 157, 162-63 (Ky. 2012
[16] Davis V. U.S., 512 U.S. 452, 461-62 (1994); Ragland v. Com., 191 S.W.3d 569, 586-87 (Ky. 2006).
[17] 570 U.S. 178 (2013) , 445 S.W.3d 1 (Ky. 2014)
[18] Baumia v. Com., 402 S.W.3d 530 (Ky. 2013).

Little v. Com., 553 S.W.3d 220 (Ky. 2018)

FACTS: Little was charged with drug trafficking as a result of his interactions in Covington with D.N., from whom several controlled buys had been made. Prior to trial, Little demanded information as to the identity of the informant (who was due to testify) and transcripts of testimony in prior court cases this informant had made. The Court ordered the Commonwealth to disclose the informant's name 48 hours prior to trial and noted that Little could obtain copies of testimony from the clerk's office. The disclosure was made approximately eight hours less than required, which cut into the ability of Little to search through the recordings to find relevant testimony from previous trials.

Little moved to exclude the testimony of the informant and was denied. He was convicted and appealed.

ISSUE: Must information be produced in a timely manner, when so ordered by the court?

HOLDING: Yes.

DISCUSSION: The Court noted that although KRE 508 creates a privilege against identifying an informant, there is an exception when the informant is to actually testify, which was the case in this situation. The Court agreed that the informant was a material witness and that withholding the name until two days before trial was unacceptable. The Court noted that safety could not be argued because the drug dealer would know his customers and could easily identify the informant.

However, the Court held Little could not identify any prejudice from the late disclosure, and he had sufficient opportunity to hear the recordings beforehand. The informant had interacted with the dealer for some two years, as well. As such, the Court agreed, the error was harmless.

After resolving unrelated issues, the Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Hass v. Com., 2018 WL 3323456 (Ky. App. 2018)

FACTS: Hass was charged in Jefferson County with the sexual abuse of an 8 year old girl, K.P. During pretrial proceedings, Hass moved to exclude the testimony of the child's aunt and the testimony of Cook, a forensic interviewer. Haas argued the testimony would be hearsay because the only knowledge either witness had about the incident came from K.P. Haas also moved to exclude a "controlled" jail call from a third party in which he talked about what had happened, and a call with the lead detective. The Court limited Cook's testimony and admitted the two phone calls. At trial, however, the Commonwealth could not obtain the testimony of the individual with whom the controlled call was made, as he was incarcerated in another state and

did not appear despite transportation being provided. The Court allowed the call to be authenticated by the lead detective and played at trial.

K.P. testified, as did her siblings and her aunt. The aunt indicated that K.P. had immediately told her what had happened. Hass, however, had left. The detective testified that he listened to the entire call at the time it was made and that he was in the caller's presence the entire time.

Hass was convicted and appealed.

ISSUE: May the identity of a phone caller be self-authenticated?

HOLDING: Yes.

DISCUSSION: First, the Court held that the testimony of the victim's aunt and Cook were properly admitted and that neither made any improper testimony. The witnesses did not repeat the victim's statements, identify Hass as the perpetrator or make any claim about the child's veracity. The Court also held that neither witness presented improper hearsay testimony. Further, the phone calls were property authenticated. Specifically, Hass argued that the detective who managed the controlled call had never heard Hass's voice before that time, and thus could not authenticate it. (He had, of course, later heard his voice on his own phone call.) Although he only later talked to Hass on the phone, the call was "self-authenticated" because Hass identified himself and it was made to Hass's phone number. He also answered to his name without objecting.

Finally, the Court held the controlled call was not hearsay because the responses were not introduced to prove the truth of the matter asserted. Hass questioned whether there was any proof that either party gave consent to having the call recorded. The Court noted, however, that the detective provided the non-appearing witness the equipment to record the call, which indicated that individual did, in fact, consent.

Hass's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

Boggs v. Com., 2018 WL 3602261 (Ky. App. 2018)

FACTS: Boggs was arrested on claims of a rape in Laurel County. During the trial, Boggs sought to introduce the blood alcohol test taken at the hospital when the victim presented there some hours later. The Commonwealth admitted the information might be relevant (in that it might impeach her statements about her level of intoxication) but the trial court denied its admission unless the hospital personnel could be located and subpoenaed to testify. Two employees were located and testified by avowal – the first from the medical records unit and the second as the person who analyzed the first of two tests administered to the victim. (It indicated

a very high level of intoxication.) The Court refused to allow the information to be presented, absent the individual who actually drew the blood.

Boggs was convicted and appealed. Looking to Mollette,[19] the trial court found it had properly denied the admission.

ISSUE: May evidence be admitted without a perfect chain of custody?

HOLDING: Yes.

DISCUSSION: The Court discussed the concept of chain of custody and noted that Boggs could not produce "both parts of the chain" – as he could not get the testimony of the technician who drew the blood. The Court looked to Rabovsky v. Com.[20] In Rabovsky, there was "no chain" at all. Courts have "long held that the chain of custody can be established through eyewitness testimony, chain of custody forms, or "testimony as to routine practice sufficient to dispel any inference of substitution or change in the contents of the exhibit in question."[21] One of the witnesses was qualified to testify as to the records and the standard process of collecting blood, and the technician could testify as to how he handled it once it was received. The Court agreed that it did not need to be perfect, and "[a]ny gaps or problems in the chain of custody, goes to the weight of the evidence rather than its admissibility."[22] The Court agreed it should have been admitted.

The Court then determined that the exclusion of the results was not harmless, and could have been critically important in judging the credibility of the victim, especially since she indicated having had less than two beers, but her first test, some hours later, provided a BA of .264.

The Court reversed the conviction.

Com. v. Thomas, 2018 WL 4377698 (Ky. App. 2018)

FACTS: Thomas was a suspect with respect to several fires that the Louisville Fire Department believed to be arson. Thomas objected to statements taken from him after the fires, claiming that he was under the influence of drugs and alcohol at the time. Thomas alleged in a post-conviction motion that the investigators had provided the alcohol while he was being questioned, but the trial court denied the motion. Thomas filed a supplemental post-conviction motion, noting that the LMPD Public Integrity Unit had investigated the claim and found it to be a valid in a report. Thomas sought to introduce the report as exculpatory evidence. (PIU concluded that he was provided alcohol, his own in a duffel bag, following the interview, not during it.) Thomas argued that he had access to his bag and that he took several pills while in the interrogation room, mainly to keep the police from finding them, and drank two beers. (His

[19] Mollette v. Kentucky Personnel Board., 997 S.W.2d 492 (Ky. App. 1999).
[20] 973 S.W.2d 6 (Ky. 1998).
[21] Mollette, 997 S.W.2d 492, 495 (Ky. App. 1999).
[22] Helphenstine v. Com., 423 S.W.3d 708, 717 (Ky. 2014).

counsel had not wanted to put him on the stand, however, because it would subject him to cross-examination.)

ISSUE: Should juries be provided with all information that might impact the credibility of an interrogation?

HOLDING: Yes.

DISCUSSION: The trial court ruled that the failure to provide the jury with the information about the intoxication was improper, and his post-conviction motion was granted, finding his counsel ineffective. The Court agreed that the deficiency made the trial result unreliable, and that the process of "obtaining the confession may have obfuscated the voluntariness of that confession." There was at least a likelihood that the result may have been different had the jury been made aware of the situation.

The Court reversed Thomas's conviction.

Nelson v. Com., 2018 WL 4050746 (Ky. App. 2018)

FACTS: In November 2014, Nelson was involved in a complex forcible rape case in McCracken County. Following the assault, the victim, N.R., sought medical help and she was examined by an experienced SANE, who took a vaginal evidentiary swab which linked Nelson to the crime. At trial, Nelson argued that the sex was consensual. He was convicted of rape, but acquitted of sodomy, and appealed.

ISSUE: May a SANE testify as an expert?

HOLDING: Yes

DISCUSSION: Nelson raised several issues on appeal. First, Nelson argued he had a right to elicit testimony as to who called 911 initially (it was the victim's husband) rather than the victim herself. The Court refused to allow this testimony when asked of the responding detective because the Court agreed it would have been hearsay. (The defense was able to elicit testimony that it was not the victim or her friend, however, who made the call.)

The Court also addressed the issue of the SANE testifying about the injuries. The SANE testified that the injuries were due to force and would have been painful. Nelson argued the testimony did not satisfy the Daubert rule for expert witnesses and under KRE 702. The Court agreed the SANE "was more than qualified to offer her professional opinion" as to the injuries, given her long experience in the field, even though she, by her admission, had little experience with examining subjects who had consensual sex to compare.

The Court affirmed Nelson's conviction.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Nunn v. Com., 2018 WL 3913329 (Ky. 2018)

FACTS: In April 2016, Nunn and Smith exchange gunfire with Powell. Although Powell was considered the victim, he had inadvertently killed a bystander, Johnson, when he returned fire. As a result, all three were charged with wanton murder in connection with Johnson's death. (Nunn and Smith were also charged with the attempted murder of Powell.) Powell accepted a plea deal. Prior to Nunn's trial, a witness identified Nunn as having been involved in another crime that occurred just before the shooting. The witness later admitted in a Facebook post that she did not actually witness that crime first-hand as she previously claimed.

Nunn moved to exclude that allegation unsuccessfully, but in fact, the witness denied her statement. The Commonwealth introduced the earlier statement into the trial, which Nunn argued was inadmissible as "an uncharged criminal act" under KRE 404(b). The prosecutor claimed that she denied her statement, having become concerned that a police report (presumably based on her statement) was circulating and placed her and her family at risk. The prosecutor insinuated that the defense counsel had leaked the statement intimidate her.

Nunn was convicted of all charges and appealed.

ISSUE: May evidence of a prior crime be introduced?

HOLDING: No (as a rule).

DISCUSSION: The trial court found that the two alleged crimes were inextricably intertwined, as the witness linked the two crimes as a basis for her identification. However, the appellate court ruled that the two were not so "linked together" that in proving one, the other was also proven. Although they occurred very close in time, there was no overlap, and each can be discussed without referencing the other. As such, although a mention might have been made to corroborate the identification, it was improper to introduce evidence of the earlier crime against an unrelated party.

With respect to the allegedly leaked report, the Court agreed that the prosecutor had a good-faith basis for introducing evidence as to who had access to the report and who, therefore, could have leaked it. However, the Court noted that in fact, the insinuation arose from defense questioning, and that it was not surprising that a witness might be concerned about disclosure of their name in the context of a serious crime. As such, the court agreed that did not prejudice Nunn.

Since the evidence of Nunn's involvement was strong, even compelling, the Court affirmed Nunn's conviction.

Cummings v. Com., 2018 WL 3913494 (Ky. 2018)

FACTS: On August 23, 2015, three women were approached by a man on a bicycle in the middle of the night in downtown Louisville. The women were unsettled by his presence. Minutes later, two of the women (the third having returned to their hotel), encountered him again. He quickly approached the two women and stabbed them, injuring them seriously. The man fled the scene. The man was identified through a photo array and surveillance video. Cummings was charged and convicted of first-degree assault and being a PFO. Cummings appealed.

ISSUE: Is admitting to something that is not, in itself, a crime, a violation of KRE 404(b)?

HOLDING: No

DISCUSSION: In addition to trial procedural issues, Cummings had moved to exclude certain portions of an interrogation recording he had made to Det. Ditch (LMPD). A part of the interrogation that was admitted without objection was Cummings' admission that he carried a knife on occasion. He objected to that statement being introduced as Improper under KRE 404(b). The Court agreed that in fact, since carrying a knife is not a crime, he did not admit to an "other crime" under that rule and as such, it was properly admitted. All it did was acknowledge that he possessed a knife. The Court upheld his conviction.

Smoot (Kevin and Kenneth) v. Com., 2018 WL 3595827 (Ky. App. 2018)

FACTS: On September 30, 2013, Gebremedhin was robbed at gunpoint by three men while leaving his convenience store in Covington. Gebremedhin told the police the men had covered their faces. One of the items stolen was winning lottery tickets and Wallace was reported to be trying to cash those tickets a few days later. Wallace led the officers to obtaining a search warrant for the Turner residence, across from the store where the robbery occurred. There they found Gebremedhin's belongings and a revolver. The Turner brothers, who lived there, implicated Kevin and Kenneth Smoot and Holder as the robbers.

The Smoot brothers were arrested and Kevin Smoot confessed to complicity with the other two. Both Smoots were indicted. At trial, another witness, Humphrey, the girlfriend of one of the Turners, testified that she saw both Smoots in possession of the stolen items at the Turner home. One of the Turner brother testified that he saw the robbery from a distance. The Commonwealth also introduced evidence of their involvement with a named gang.

Both Smoots were convicted and appealed.

ISSUE: May evidence of prior crimes be admitted for context?

HOLDING: Yes

DISCUSSION: First, the Court addressed the evidence as to their gang membership. The Court agreed that under KRE 404(b) "evidence is not admissible "to prove the character of a person in order to show action in conformity therewith." However, it continued "it may be admissible:

> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

In Kenneth's case, the Commonwealth argued that: "1) the evidence provides a general context for the robbery and surrounding circumstances; 2) the evidence will provide a general context for witness testimony and the victim's testimony; 3) the evidence provides a possible motive for the crimes." The Court agreed that the evidence was not introduced for character, but to "demonstrate that the relationship among this group – defendants and witnesses alike – was "more than casual." The evidence was probative and carefully tailored. The Court agreed as well, that evidence that one of the Turner brothers was also involved in a robbery connected to the store was properly excluded as it was not similar to the case at bar.

In an unrelated argument, Kenneth argued that he had invoked his right to counsel and that any responses he made past that point should be excluded. The trial court studied the video and concluded that he did not clearly invoke his right to counsel in such a way that a reasonable officer would have understood it. Although he occasionally mentioned an attorney, he did not articulate his desire to have an attorney present, and the appellate court agreed that the trial court properly admitted his statements.

The Court affirmed the convictions.

TRIAL PROCEDURE / EVIDENCE – TRIAL

Harmon v. Com., 2018 WL 3954306 (Ky. App. 2018)

FACTS: The night before his trial, Harmon asked that his clothing be brought to the jail, and that was done. Unfortunately, when he arrived at court, he was still in his jail clothing. His counsel expressed concern and the judge allows him to borrow a white dress shirt until Harmon's wife could collect his clothing at the jail and bring the clothing to court. As such, Harmon was in court during voir dire wearing jail pants and flip flops, and the dress shirt. He was permitted to change about noon. Harmon was ultimately convicted and appealed, having been forced to appear before the jury in the identifiable clothing.

ISSUE: Should defendants ever be forced to appear before a jury in jail clothing?

HOLDING: No.

DISCUSSION: The Court agreed the process was improper and that Harmon was compelled to present himself to the jury in jail clothing. As such, his conviction was reversed and remanded.

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Tipton v. Com., 2018 WL 4378721 (Ky. App. 2018)

FACTS: Tipton was charged in Bourbon County with 100 counts of possession of matter portraying a sexual performance by a minor and a single count of distribution. The evidence had been located via an Attorney General Investigation using forensic computer software and connected to an IP address owned by Tipton's mother at a location in Paris. During the execution of a search warrant, Tipton claimed knowledge of the material found on two computers at the home and a forensic examination revealed the material.

Tipton was indicted and sought suppression. The trial court ruled that the searches were proper, and further admitted his statements. He was ultimately tried for 20 possession charges and was convicted. He appealed, arguing that the multiple charges constituted double jeopardy and that the act of possession the images constituted a single offense. The trial court disagreed and he was convicted. He then appealed.

ISSUE: Does multiple counts of the same offense constitute double jeopardy when the offense is conducted as a single course of conduct?

HOLDING: No.

DISCUSSION: The Court looked to Blockburger v. U.S. and related cases.[23] Tipton argued that the downloading and possession of the pornographic matter constituted a "single course of conduct" and only one charge was appropriate. He relied on U.S. v. Buchanan.[24] The Court noted that Buchanan was tried under a federal statute, where Tipton was charged under a state law – KRS 531.335. Under that state law, the singular form of the nouns was used, and as such, the criminal possession was tied to each of a single image, rather than a multiple.
The Court affirmed the convictions.

EMPLOYMENT

Shreve v. City of Romulus, 2018 WL 3428703 (6th Cir. 2018)

[23] 284 U.S. 299 (1932).
[24] 485 F.3d 274 (5th Cir. 2007).

FACTS: Just two weeks in Shreve's FTO time as a Romulus police officer, he was severely injured on duty in a vehicle crash. (His FTO was driving, and they were struck by a third party.) He was on leave for some sixteen months. When he returned to work, in April 2014, he struggled and ended up restarting the program. As he was experiencing pain, he was put on work restrictions. With light-duty not being available, he was put back on medical leave in October 2014. In February 2015, there was a discussion with city officials about possibly becoming a dispatcher, but Shreve indicated he still wanted to be a police officer and he did not apply for a dispatch position. Finally, in October 2015, Shreve was terminated as he was deemed unable to complete the FTO training.

Shreve filed a complaint with the EEOC and was given a right to sue letter. He filed suit, arguing among other claims, federal disability discrimination. The Court found in favor of the city and Shreve appealed.

ISSUE: Do probationary employees have a protected property interest?

HOLDING: No

DISCUSSION: The Court noted that at the time, Shreve did not have a protected property interest in the position, although under the Collective Bargaining Agreement, he was a probationary employee that could be terminated at will. Looking at the provisions of the agreements, there were two in place during the duration of his case. The Court agreed that despite the passage of time, he was still a probationary officer and could be terminated.
Under federal disability claims, the Court agreed that the ADA imposes a need to reasonably accommodate an employee with a disability unless the employer can demonstrate that the accommodation would impose an undue hardship. The ADA also requires an interactive process with the employee to find that appropriate balance. There were two possible options – light duty or an assignment to dispatch. The City argued that to be eligible for light duty, he must have first completed FTO – as it would involve tasks only a fully trained police officer could do. The Court held he was ineligible for light duty as he had not completed FTO. Further, the Court noted, although there was discussion about a dispatch position, Shreve expressed no interest in the position and stated he wanted to continue to strive to be an officer. Thus, Shreve did not accept a reasonable accommodation.

CIVIL LITIGATION

Chen / Jiang v. Pawul, 2018 WL 3814764 (Ky. App. 2018)

FACTS: In May 2014, Chen and Jiang (a married couple) owned and operated a restaurant in Louisville, and lived nearby. They became the subject of a search warrant, initiated by Det. Pawul (Louisville Metro PD) concerning human trafficking (forced labor/ prostitution). During the search, a large about of foreign money was recovered and the employees, who lived in small rooms in the basement, were interviewed. Chen was arrested and Jiang was cited. Search warrants for bank records and cell phones yielded information on wire transfers from China.

Nothing was found on the phones. The arrest was the subject of a lot of media attention and the restaurant was closed. At the preliminary hearing, however, the trial court found no evidence of a felony and Chen was not prosecuted.

Chen and Jiang filed suit against Det. Pawul for malicious prosecution and related assertions. Discovery was delayed, however, because Chen and Jiang were also under federal criminal investigation in another state. Eventually, Pawul moved for summary judgment, asserting qualified official immunity. The court ruled that Pawul was not entitled to immunity, but that he was entitled to judgment as a matter of law on the claims.
Chen and Jiang appealed.

ISSUE: Is the defense to a false arrest claim probable cause?

HOLDING: Yes.

DISCUSSION: The Court first addressed claims of false arrest, which is assessed in the same manner as unlawful imprisonment. The Court held that an officer is entitled to make a warrantless arrest upon observations that a felony is being committed. The Court stated that although the district court found otherwise, that finding did not mean that Chen was arrested without probable cause. Specifically, "the finding at a preliminary hearing addresses whether there is sufficient cause to prosecute; it does not address whether a police officer had probable cause to make an arrest at the moment the arrest was undertaken."[25]

While Det. Pawul was present at the house, he discovered that the employees were "living in an atypical – if not substandard – situation in the basement of the home, and paid no rent." They also did not receive mail. They were transported back and forth to the restaurant in a vehicle with benches and their movement restricted. Chen had offered to "loan out" female employees for the night, the employees lacked a basic understanding of the English language, did not have Social Security numbers, worked excessive hours, and did not know the names of the pair they worked for. As such, Pawul was not incorrect in concluding that he had probable cause for human trafficking.

With respect to malicious prosecution, the Court determined that since Pawul had probable cause, malicious prosecution could not be proven. For conversion and trespass, the Court held that seizing and holding the assets pursuant to warrants was proper. Finally, with respect to a defamation claim, there was nothing to indicate anything said (in the warrants or elsewhere) was false, and as such, could not be defamation. Nothing indicated Det. Pawul acted in anything other than objective good faith.
The Court affirmed the dismissal of the action.

City of Nicholasville v. Abraham, 2018 WL 3595308 (Ky. App. 2018)

[25] Com. v. Wortman, 929 S.W.2d 199 (Ky. App. 1996).

FACTS: On March 11, 2015, Rhoads, a Nicholasville police officer, was killed in a three car collision. At trial, the Court refused to give the jury the "sudden emergency" instruction, as the judge believed it was no longer compatible with negligence law, which is now comparative negligence. Under comparative negligence, a jury would be told that the party may have found themselves suddenly and unexpectedly in a position of imminent peril, which left them no time to compare courses of action. Although Rhoads had the right of way, a second driver cut across his lane of travel, and he struck both that vehicle and the third vehicle as a result. The jury apportioned the majority of the fault to Rhoads, under the assertion that he was driving at a higher rate of speed than permitted, for no reason, also that was not actually proven and the City's expert was not allowed to testify. The City and connected parties appealed.

ISSUE: Is the sudden emergency doctrine still a viable defense?

HOLDING: Yes

DISCUSSION: The Court held that it was improper not to have provided the sudden emergency doctrine, and to disallow the city's expert from testifying as to Rhoads' speed. The Court declined to address unrelated insurance issues, however.

SIXTH CIRCUIT

FEDERAL LAW

FELON IN POSSESSION

U.S. v. Kennedy, 2018 WL 3957169 (6th Cir. 2018)

FACTS: On May 27, 2016, Ypsilanti (MI) officers stopped a vehicle for speeding. A female was driving, with Kennedy in the passenger seat and two children in the back. The vehicle smelled of marijuana. Both of the adults were removed from the vehicle. Kennedy had marijuana on his person that was found during a frisk. As Kennedy was being arrested, a soft holster fell from his pants leg.

Finding the holster, the officers searched the vehicle for the gun, finding it wrapped in a knit hat that was resting against the driver's side footwell, but within reach of the passenger. The gun fit the holster. Kennedy saw them find the gun and asked that they let him "kiss his kids" as he was going to be "gone for awhile." Kennedy admitted he did not have a concealed carry permit, as he had a felony. The gun was discovered to have been stolen. Kennedy admitted he owned the gun, having bought it for protection.

Kennedy was convicted and appealed.

ISSUE: Is proximity enough for a felon in possession charge?

HOLDING: Yes.

DISCUSSION: The Court agreed there was "substantial circumstantial evidence" linking Kennedy to the gun, more that simple proximity. His arguments, that there was no forensic evidence linking him to the gun and that his left arm was in a cast (making it more difficult temporarily to have reached it from where he was) was unavailing.

Kennedy's conviction was affirmed.

U.S. v. Horton, 2018 WL 3620727 (6th Cir. 2018)

FACTS: Johnson City (TN) officers received a report of an assault with a firearm at a nightclub. They spotted a man matching the suspect's description duck behind a vehicle. He (Horton) was seized, the area checked, and officers found crack cocaine and a Glock. Horton's DNA was found on the gun. As Horton was a convicted felon, he was charged under federal law for the firearm and drugs.

At trial, witnesses placed Horton at the scene, and the DNA evidence was linked to him as well. (Although other DNA was found on the weapon, the majority of it belonged to him.) Horton was convicted and appealed.

ISSUE: May direct and circumstantial evidence prove possession of a firearm?

HOLDING: Yes.

DISCUSSION: The Court agreed that the prosecution "provided substantial direct and circumstantial evidence" of his possession of the gun. Witnesses placed him with a handgun, and a handgun was found close to where was arrested – under a vehicle in a parking lot. Another witness, who was in jail with Horton, testified that Horton admitted having the gun.

The Court held that Horton was properly shown to have possessed the gun in question. The conviction was affirmed.

U.S. v. Slaughter, 2018 WL 4664120 (6th Cir. 2018)

FACTS: On July 2, 2015, Louisville police detectives observed Scott make what they believed to be a hand-to-hand drug transaction with a passenger in another vehicle. That passenger proved to be Slaughter. When challenged to "show his hands," Slaughter failed to do so, leading Det. Benzing to grab Slaughter's hand and pat down that pocket, where he found a gun. He was pulled from the vehicle and searched. Drugs were found during the search.

When Slaughter was found to be a convicted felon, he was charged under federal law. He was also to face an enhanced sentence if he had three prior qualifying convictions. He moved to suppress the search, arguing that Scott had dropped the weapon inside the car, even claiming that Scott put it in his pocket. He argued that "such fleeting, unintentional possession" was not a violation.

Slaughter was convicted and appealed.

ISSUE: Is short term possession of a firearm enough to support a possession charge?

HOLDING: Yes

DSICSSUION: The Court held that the detectives' action were proper under Terry, and that the frisk was also proper. Once the gun was found, it was appropriate to put Slaughter into custody until the situation was further investigated. The Court also noted that although "not all burglaries are created equal" under the ACCA, his specific conviction fell under a part of the Kentucky Burglary statute which qualified as a predicate offense under the federal law.

Slaughter's conviction and enhanced penalty under the ACCA was upheld.

DRUG TRAFFICKING

U.S. v. Prince, 2018 WL 4362214 (6th Cir. 2018)

FACTS: On September 6, 2016, B.R. asked Prince to assist in obtaining heroin. She took him to a location where she bought two bindles with B.R.'s money. She warned B.R. that the drugs were powerful, and in fact, they were laced with fentanyl. B.R. ingested the drug and suffered an overdose. EMS revived B.R. and he suffered no medical complications. Prince and his suppliers were arrested for distributing the laced heroin.

Testimony indicated that B.R. had suffered an overdose that would have proven fatal without intervention. Prince was convicted and given an enhanced sentence due to the fentanyl. She appealed.

ISSUE: Is an overdose requiring emergency treatment a serious physical injury?

HOLDING: Yes

DISCUSSION: Prince argued that the overdose, and the treatable breathing issue, did not constitute a "significant physical injury" to support the enhanced penalty. The Court agreed that under federal law, any pain or condition that required medical treatment was a significant physical injury and that Prince was aware of the strength of the drug. The Court agreed that while the condition was successfully treated, it was still a significant injury.

The Court affirmed the enhanced penalty.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Owens, 2018 WL 3801701 (6th Cir. 2018)

FACTS: On January 4, 2017, The Kalamazoo Valley Enforcement Team (KVET) obtained a search warrant for Owens's home. The affidavit included a number of items, including information from an informant who made a controlled money exchange on a drug debt. Officers executing the warrant found drugs and over $23,000 in cash. Owens unsuccessfully moved to suppress. The trial court placed weight on the most recent informant's actions but found the earlier tips to be stale.

Owens appealed the denial of the motion to suppress.

ISSUE: May an anonymous tip be corroborated by investigation?

HOLDING: Yes.

DISCUSSION: Owens argued that the search warrant affidavit "failed to include information about the reliability of the informant on which it relied." The Court held that a tip could be judged through the prior track record of the informant, or through corroborating information. Because the tip was anonymous, the first was unavailable. The Court agreed, however, that "Owens's statements during the controlled money exchange sufficiently corroborated the informant's tip to create probable cause." It specifically matched the information shared by the tipster. Although drugs were not specifically mentioned, it was a reasonable inference.

In any event, the Court held that the good faith exception would save the warrant anyway.

The Court affirmed the denial of the suppression motion.

U.S. v. Jenkins/ Howell , 2018 WL 3559209 (6th Cir. 2018)

FACTS: In a detailed situation, a CI placed a call to a "Ghost Phone" and arranged for a buy. Five controlled heroin buys were made in the Kalamazoo area. A phone ping on the number dialed placed the phone's location on Dori Drive, and a vehicle involved in one of the buys was registered to Howell's girlfriend, who lived at the location. In subsequent buys, the vehicle again appeared, and Howell was seen looking out the window of the apartment. Right after the last buy, officers obtained a search warrant for that location. A quantity of drugs and other items were found.

As the investigation continued, and a second phone and two additional dealers, including Jenkins, came into play. Six more controlled buys were made and more locations were linked to the distribution ring. Warrants were obtained for three locations, one of which was also connected to Howell and his girlfriend. More drugs were found in those locations. Keys to a rental car were found. The vehicle, rented by Jenkins' girlfriend, was seized and towed. A number of stolen guns were found inside.

Jenkins and Howell were arrested and charged. They demanded suppression and were denied. Both entered conditional guilty pleas and appealed.

ISSUE: Must a nexus be shown between a location and drug dealing for a search warrant?

HOLDING: Yes.

DISCUSSION: To determine if the search warrants were valid, the Court looked at the links between the residence and the drug trafficking crimes. Therefore, "to meet the probable cause standard, an affidavit must include some facts connecting the residence to drug-dealing activity beyond just the defendant's status as a drug dealer.[26] In the case of Howell, the Court agreed,

[26] U.S. v. Brown, 828 F.3d 375 (6th Cir. 2016)

there was reliable evidence linking the address to the ongoing drug-dealing operation, in particular the "key instrumentality of the crime—the Ghost Phone—to the Dori Drive address." Officers also linked a vehicle to that location. The Court found a sufficient nexus for Howell.

For Jenkins and Howell, and the second warrant, the Court noted there was "particularly strong evidence establishing probable cause." Although no drugs were purchased from that location, nor was there a witness to drugs there, "[d]rug dealers cannot immunize themselves from search of a residence used to store their supply simply by ensuring that all drug deals take place in parking lots." Howell left that location, made a drug sale and then immediately returned to that location. With respect to the other two locations, the Court agreed that while there may have been less nexus, the Good Faith exception applies.[27] The Court held that the affidavits articulated a "minimally sufficient nexus" – not strong but not bare-bones, either. Accordingly, those search warrants were upheld.

Jenkins also argued that evidence found in a suitcase he left in another location should be suppressed, but the court held that he had no legitimate expectation of privacy in the suitcase. Jenkins left it unlocked in the living room of a home of a person he did not know, and who specifically "did not want him in her apartment," nor any part in drug trafficking. The Court noted that it was "hard to imagine that upon discovering such a suitcase, the apartment's occupant *would not* examine its contents."

Finally, with respect to the rental car, the Court held a third party rented it and he provided no indication he even had permission to drive it. As such, he lacked standing.

The Court affirmed convictions.

U.S. v. Houser, 2018 WL 4692328 (6th Cir. 2018)

FACTS: In January 2017, Det. Alcantara, Euclid (Ohio) PD, sought a search warrant on a house in which he recently worked with a CI to make a controlled buy. Law Enforcement linked Houser to a specific apartment when he emerged to make the exchange with the CI. Further, the search warrant specifically asked for firearms, given the acknowledged link between firearms and drug trafficking. In the subsequent search, a stolen revolver and a minimal amount of drugs was found, and Houser admitted ownership of the items.

Houser, being a convicted felon, was charged with the firearm. He argued that the investigation did not provide a sufficient nexus between his apartment and the drug trafficking. The suppression motion was denied. Houser entered a conditional guilty plea and appealed.

ISSUE: May several circumstances be linked to provide nexus for a search warrant?

[27] U.S. v. Watson, 498 F.3d 429 (6th Cir. 2007) (quoting Massachusetts v. Sheppard, 468 U.S. 981 (1984)); see also U.S. v. Leon, 468 U.S. 897 (1984).

HOLDING: Yes.

DISCUSSION: The Court reviewed the information available to the officers, which included a controlled buy within the previous few days, and connected the information with Houser. They also directly observed Houser leave his apartment, make the exchange, and return to that apartment.

The Court affirmed the conviction.

U.S. v. Walling, 2018 WL 4144992 (6th Cir. 2018)

FACTS: On May 17, 2016, Hesche obtained a search warrant for Walling's Michigan home. The focus in the affidavit was for material relating to minors and child pornography. Specifically, the warrant discussed two federal crimes - coercion and enticement of a minor, and transfer of obscene material to minors. It also included a "substantial amount of general material" regarding child pornography, and sought to allow a seizure of correspondence and contact information, along with child erotica.

During the search, officers found several electronic devices, none of which produced any evidence usable at trial. Walling admitted to communicating with and having sex with two underage girls, and possessing nude or sexually explicit pictures of the girls. The girls were located and made statements. Walling was indicted for those interactions. Walling unsuccessfully moved to suppress.

ISSUE: Should a warrant be clear on what type of crime is suspected?

HOLDING: Yes.

DISCUSSION: Walling argued that there was no probable cause for a search for evidence of child pornography or erotica, and the Court agreed that "the structure of the affidavit leads to some confusion about the true purpose of the search." The beginning and end of the affidavit in support of the warrant discussed other specific charges, but the body of the narrative referenced child pornography. However, there were only "limited factual allegations" within the body of the affidavit that he possessed it.

Severing the offending portions and focusing on his statements, the Court held that it was still appropriate to search the cell phone. Even a "more limited version" would have still had officers at his home where he made his incriminating statements. As such, the Court held the evidence related to his confession was admissible.

U.S. v. Huntley, 2018 WL 3620721 (6th Cir. 2018)

FACTS: Law enforcement identified Huntley as involved in methamphetamine trafficking in Tennessee. A CI described his modus operandi, and his flights to obtain drugs, and officers

corroborated that information. They learned he owned a number of guns and threatened others with them as well. In February 2016, they decided to act, just after he returned from a drug buying trip. As they were getting the warrant signed, officers learned that Huntley had contacted the CI and asked him to come to the house. The warrant authorized a search at any time, day or night, and emphasized the need for surprise. Although not specifically called an anticipatory warrant, it identified the need to do the search just after his return, presumably with drugs.

The next morning, law enforcement executed the warrant and seized a large quantify of drugs, and a firearm. Additional guns were found in a storage unit.

Huntley was indicted. Huntley argued that the CI had not followed the directions, which was to collect the methamphetamine offered and deliver it. Instead, the CI left the drugs in a mailbox for the officers to retrieve. (The CI claimed he was with a Huntley associate and could not connect with the officers.) The Court trial court determined that the warrant was anticipatory but found the "triggering conditions had occurred, and if not, that Leon's good faith exception applied.[28] Huntley entered a conditional guilty plea and appealed.

ISSUE: May a warrant be flexible with respect to when it will be served?

HOLDING: Yes.

DISCUSSION: The Court looked to the cases of U.S. v. Perkins[29] and U.S. v. Grubbs.[30] The Court noted that such warrants provide triggering conditions, and noted that the warrant in this case was not an anticipatory warrant because it lacked the usual language. Instead, the warrant, for the sake of safety, provided the officers flexibility in when to serve it.

The Court affirmed the denial of the motion to suppress and upheld the plea.

U.S. v. Brown, 2018 WL 4275896 (6th Cir. 2018)

FACTS: In August 2016, a Maysville motel clerk called the police with respect to Smith, a hotel guest. Smith claimed a man she was with might have a gun and she was hiding in the office. Officers found Smith intoxicated but coherent. Smith claimed that Brown, the man she was with, had a gun and had given her methamphetamine to hide, with more in the room that was hidden in a cooler. She handed over the drugs. Officers found Brown in the lobby with $10,000 in cash, but no guns. Smith was taken to the room and gave her consent to search. No one had a keycard, but the door was ajar so the officers entered. In plain view, the officers saw two guns and drug paraphernalia. The officer unloaded the weapons and provided the serial numbers to dispatch.

[28] 468 U.S. 897 (1984).
[29] 887 F.3d 272 (6th Cir. 2018).
[30] 547 U.S. 90 (2006).

Officers soon learned Brown was a convicted felon and obtained a warrant. The officers found methamphetamine, another gun, and related items. Brown was indicted for the drugs and the guns. He moved to suppress. The trial court denied the motion.

Brown entered a conditional guilty plea and appealed.

ISSUE: May improper information be severed from a warrant, and the warrant still be held valid if sufficient information remains?

HOLDING: Yes.

DISCUSSION: The Court reviewed the warrant affidavit, which outlined the initial interaction with the witness. The Court produced the following, striking out the portions relating to what was found in the initial, challenged entry:

> At approximately 5:25 am Maysville Police were called by Super 8 motel personnel advising of a possible domestic situation. The clerk advised that a female came to the desk and stated that the male subject had a gun in his pocket and had guns in the room. The female also said another female was hiding in the restroom of the room.
>
> When the Affiant and other MPD officers responded, they encountered the female and identified her as Chasity Smith. Smith stated that the male subject Mark Brown, threw her a bag of "dope" which Affiant believes to be methamphetamine. The substance has not yet been tested. She also told Affiant that Brown had guns and she expressed fear for her own safety.
>
> Mark Brown then came into the lobby and advised Affiant that he would not speak with officers. A criminal history check reflects that the [*sic*] Brown is a convicted felon. ~~The door to the room was slightly ajar, and MPD officers made entry into the room to determine if there indeed was another female in the room needing assistance. No female or other person was present in the room.~~ When Mark Brown was patted down no weapons were located, but Brown had approximately $10,000 in cash on his person, which is being held by MPD.
>
> Chasity Smith advises that Brown is or was cooking methamphetamine in a cooler in the room. She also says there are pills in the room. ~~MPD officers saw a cooler in the room, and saw two handguns and a crack pipe in the room in plain view.~~
>
> Both Mark Brown and Chasity Smith were both [*sic*] staying in the room, and Chasity Smith will consent to search. Due to the objection of Mark Smith [*sic*], this search warrant is being obtained.
>
> The vehicle identified above is located in the parking area of the motel and is in the possession of Mark Brown. MPD canine indicated that such vehicle contains the odor of

drugs. ~~Room has been secured and~~ questioning of Chasity Smith continues. Mark Brown is being detained pending charging.

The Court agreed that even without the evidence located in the room during the entry, the officers had more than sufficient evidence to support the warrant – corroborated eyewitness testimony from an identified subject.

The Court affirmed his plea.

SEARCH & SEIZURE – TRAFFIC STOP

U.S. v. Stokes, 2018 WL 3434528 (6th Cir. 2018)

FACTS: In May 2015, O'Bryan was arrested with a quantity of drugs and guns. He agreed to cooperate with police and set up a controlled buy with Wallace, who was also arrested. On July 25, O'Bryan contacted police and told them about Stokes, who was at Kentucky Downs with methamphetamine and over $100,000 in cash. Officers surveilled Stokes and followed him, and ultimately made a traffic stop on a pretext. No evidence of criminal activity was found during the stop, and the officer issued Stokes a warning.

With that officer was Deputy Hargett, who had a drug K-9, Gunner, in the cruiser with him on the stop. Gunner was brought out after the warning was given. Stokes refused consent for a search, but Gunner was deployed and alerted. Deputy Hargett got inside the truck and found a quantity of methamphetamine and $184,000 in cash.

Stokes moved for suppression. The Court agreed that the officers had probable cause for the search via the tip and denied the motion. Stokes appealed.

ISSUE: May a warrant be supported by corroborated tips?

HOLDING: Yes.

DISCUSSION: The Court determined this matter fell under the automobile exception – and noted that ""[u]nder the automobile exception to the warrant requirement, law enforcement officers may search a readily mobile vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of a crime."[31] "An automobile search is not 'unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.'"[32]

In this case "probable cause may come from a confidential informant's tip, when sufficiently detailed and corroborated by the independent investigation of law enforcement officers." With

[31] U.S. v. Lumpkin, 159 F.3d 983 (6th Cir. 1998).
[32] U.S. v. Arnold, 442 F. App'x 207 (6th Cir. 2011) (quoting U.S. *v.* Ross, 456 U.S. 798 (1982)).

respect to tips, the Court agreed that "[i]nformants' tips . . . come in many shapes and sizes from many different types of persons."[33] In analyzing the totality of the circumstances in this context, we therefore recognize that "a deficiency in one [relevant consideration] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." We have also conceived of this exercise as involving a "sliding scale" that runs between less reliable tips (such as those come from anonymous sources) and more reliable tips (such as those that come 'from known or reliable informants')."[34]

With respect to this case, the Court held, "the totality of the circumstances reveals enough to get the Government over the goal line, though perhaps not with a lot of breathing room." The informant was known and had been reliable before, and had personally seen the items in question. Some information could be corroborated, and although "[m]ake no mistake, these were relatively easy to know (and innocuous) facts, and the simple fact that police were able to corroborate them does not itself establish probable cause under our precedents." The weakness in that last element was balanced by the strong details otherwise provided.

The Court agreed that "an even more reliable tip would make this case easier, but that it had to take cases as they were found.

The Court upheld the search.

42 U.S.C. §1983

42 U.S.C. §1983 – FALSE ARREST

Stillwagon v. City of Delaware, 2018 WL 4055972 (6th Cir. 2018)

FACTS: In 2012, Stillwagon, age 63, was riding his motorcycle toward Delaware, Ohio. Stillwagon and Mattingly arrived and did business at the same gas station, leaving at essentially the same time. As they departed, Mattingly began passing the motorcycle, and then stopped and waited, and ultimately used a baseball bat to wave Stillwagon around him. Stillwagon elected to wait for Mattingly to proceed. Ultimately, in the usual flow of traffic, Stillwagon passed Mattingly, who then proceeded to cut in several times towards Stillwagon's motorcycle, causing him to swerve. Stillwagon pulled over to the side and armed himself, as he had a weapon in a bag. One driver stopped to check on him, and he asked that the police be called. Other witnesses saw part of the interaction as well. As it was indicated that it would take some time for the police to arrive, Stillwagon elected to leave.

Some few miles later, Mattingly again appeared. He passed a number of vehicles, almost causing a collision, until he was behind Stillwagon and tried to ram him. Stillwagon accelerated to avoid him. Mattingly cut in front of him, Stillwagon stopped, and Mattingly drove away. Another

[33] See Gates, 462 U.S. at 232.
[34] U.S. v. Williams, 483 F. App'x 21, 25 (6th Cir. 2012).

incident occurred a few more miles down the road and eventually, Mattingly drove directly at Stillwagon, who had stopped in a parking lot. Stillwagon fired a shot into Mattingly's engine. He and Mattingly engaged and Stillwagon struck Mattingly with the pistol, which discharged harmlessly. Stillwagon asked a bystander to call the police.

Police arrived and arrested Stillwagon. He did not resist arrest. Det. Ailes handcuffed Stillwagon and placed him on his stomach in the cruiser. Stillwagon was left on his stomach for a long period. Mattingly was taken to the hospital, denied having been shot, and left without treatment because he had violated his parole for an unrelated crime by drinking and driving. Stillwagon was questioned and his hands bagged, "tourniquet tight." He was interviewed by two detectives, who found his statement credible. Security video confirmed the statement but they decided to charge Stillwagon with assault. Mattingly, however, was not interested in pursuing the case. (Specifically, the charges indicated he shot Mattingly in the head, which was not the case.)

The detective characterized a "mutual road rage incident" to the grand jury. He testified that Mattingly had been shot, based on his own interpretation of the laceration on his head, and indicated it had occurred from some distance away. He omitted the testimony of a witness that comported with Stillwagon's account.

Detective Segaard also created a grand jury synopsis PowerPoint presentation in which he omitted critical acts and facts and misstated or misrepresented others. For example, he created a "Road Rage" slide which stated there were "multiple reckless operation instances [by] both Parties" and that the road rage "ended at one point" but was "started back up again by Stillwagon." This was not true and was the exact opposite of what happened. It was Mattingly who lay in wait for Stillwagon. Segaard fails to mention that Stillwagon asked a witness to call the police and that the police were in fact called. Further, Segaard omitted 6 miles of the 15-mile interaction. After the Watkins Road incident, Segaard omitted the incident at Section Line Road where Mattingly lay in wait for Stillwagon and then tried to run him over. Instead, Segaard told the grand jury that the next incident occurred when Stillwagon "caught up with Mattingly at US 23 off-ramp."

For the parking-lot portion of his presentation to the grand jury, Detective Segaard created an "animated diagram" to illustrate the movements of participants as displayed by the security video. In an email, assistant prosecutor Doug Dumolt complimented Segaard on his presentation, saying, "I especially liked the animation of the vehicle and the blood from the victim." The slides show Stillwagon firing a shot directly at Mattingly and then show Mattingly getting shot in the head, blood and all. Neither of these events ever happened. Stillwagon was indicted but at trial, the trial judge ruled in his favor.

Stillwagon filed two lawsuits. Ultimately, the trial court denied qualified immunity to the officers involved in the false arrest and malicious prosecution prongs of the case, and the officers appealed.

ISSUE: May presenting fabricated evidence in a trial lead to a false arrest lawsuit?

HOLDING: Yes.

DISCUSSION: Although the defendants framed the case as Stillwagon hitting Mattingly, the Court noted "Stillwagon was prosecuted for *shooting* Mattingly in the head and his § 1983 claims arose from defendants' affirmative efforts to create a false narrative of events by fabricating evidence, filing false reports, and making misleading omissions in an effort to "prove" that Stillwagon *shot* Mattingly in the head, even though no such shooting occurred."

Stillwagon agreed it was proper to detain and question him, but that his arrest was improper. The trial court noted that Stillwagon attempted to disengage at several points, and that his firing at the truck was defensive. It agreed that any reasonable officer would "have conclusively known that Stillwagon was acting in self-defense and that probable cause to arrest him for felonious assault was, therefore, lacking regarding the blow Stillwagon delivered to Mattingly's head using the butt of his pistol." To prove self-defense in Ohio, the accused must prove by a preponderance of the evidence that 1) he was not at fault for creating the violent situation, 2) that he had a bona fide belief that he was in imminent danger of death or great bodily harm, 3) that his only means of escape was the use of force, and 4) that he did not violate any duty to retreat or avoid the danger.[35]

Stillwagon had a "bona fide belief he was in imminent danger of death or great bodily injury and that his only means of escape was the use of force because a) Stillwagon had informed officers that he was afraid for his life; b) he informed officers that Mattingly had tried to kill him multiple times; c) the police found the baseball bat in Mattingly's truck; and d) the parking-lot video supported those statements, as it shows Mattingly leaving the parking lot and then re-entering the parking lot driving directly at Stillwagon. In hitting Mattingly on the head with the butt of his gun, Stillwagon used only the amount of force reasonably necessary to repel Mattingly's attacks."

The Court agreed he was falsely arrested.

With respect to a malicious prosecution claim, the court agreed, "since 2012, the Supreme Court has extended to law-enforcement officers absolute immunity for their acts as grand-jury witnesses."[36]

Further:

> As a rule, when a plaintiff is arrested pursuant to a grand-jury indictment, "the finding of the indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause. But, the presumption of probable cause created by a grand-jury indictment is rebuttable "where 1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements . . . or falsifies or fabricates evidence; 2) the false statements and evidence,

[35] State v. Thomas, 673 N.E.2d 1339 (Ohio 1997); State v Williford, 551 N.E.2d 1279 (Ohio 1990). "
[36] Rehberg v. Paulk, 566 U.S. 356 (2012).

> together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and 3) the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony . . . ."[37]

Given the magnitude of the "alleged false and fabricated evidence," the Court agreed that the evidence amassed and presented was not protected by absolute immunity. In fact, the evidence indicated they were trying to get Mattingly to admit he had been shot in the head and that he had a plausible reason for his actions. The Court agreed the officers were not entitled to absolute (or qualified) immunity.

With respect to the liability of the law enforcement supervisor, the Court agreed that he "directly participated in his subordinates' alleged unconstitutional behavior." He engaged in activities to support the version that put Stillwagon at fault, despite strong evidence to the contrary, and "implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of his subordinates."

With respect to excessive force claims, concerning his placement in the cruiser and the bag taping, the Court noted that Ailes's attempt to cram Stillwagon in the cruiser constituted excessive force because of Stillwagon's physical disabilities and he was cooperative. With respect to the bags, the Court noted paper bags were normally used. The bags were so tight that they steamed up, and scissors had to be used to get them off. The Court noted that "tight-handcuffing precedent puts officers on notice that they cannot cut off the circulation to a suspect's wrists—regardless of how they do it." The Court agreed that qualified immunity was not appropriate for the claims.

42 U.S.C. §1983 – SEARCH WARRANT

U.S. v. McCoy / Heard, 905 F.3d 409 (6th Cir. 2018)

FACTS: In 2016, Cincinnati police received a CI tip that McCoy and Heard (with another) were selling marijuana from two adjacent stores. McCoy and Heard shared a home at another location, as well. The CI reported having seen marijuana in guns in that home. Officer Longworth began surveillance and noted a great deal of foot traffic. He knew that the two men had drug-trafficking histories. On October 14, McCoy saw Heard and Brown park illegally, which led to Brown being arrested for an unrelated crime. He then spotted Heard walking out of the store (where they were parked) with a large bag of marijuana "hanging from his pants." He too was arrested.

Using all this information, officers obtained a warrant, but found no narcotics in the stores. They obtained a second search warrant for the home where a large amount of heroin, marijuana, $38,000 in cash, paraphernalia, and a gun were found.

[37] King v. Harwood, 852 F.3d at 587-88.

Both men were charged with federal drug trafficking offenses. Both men moved to suppress both warrants. The trial court upheld the store warrant, but the home warrant "did not fare as well." The Court found an insufficient nexus to link the criminal activity with the home and vacated the warrant. The Government appealed.

ISSUE: Will good faith reliance on a search warrant that was erroneously issued permit the admissibility of evidence obtained as a result of the execution of that warrant?

HOLDING: Yes.

DISCUSSION: The Court noted that when a warrant is held to be insufficient, it is possible the good faith rule – Leon – might apply. Although it is the responsibility of the judge to ensure a warrant is valid:

> … judges sometimes make mistakes. When this happens, law enforcement may obtain a warrant that it shouldn't have obtained and search a place that it shouldn't have searched. The exclusionary rule usually prevents the government from using illegally obtained evidence in a criminal proceeding against the victim of the unlawful search and seizure.[38] A magistrate judge's error in issuing a search warrant, however, does not always require suppression of reliable evidence.[39] In United States v. Leon, the Supreme Court created an exception to the exclusionary rule.[40] The Court held that when an officer relies on a search warrant later invalidated, evidence obtained from the warrant-authorized search is admissible unless reasonable officers would not have believed the warrant constitutionally permissible. As the Court explained, the judge issuing a warrant—not the officer applying for one—has responsibility for determining whether probable cause exists, and the rule excluding unlawfully obtained evidence has little deterrent effect when applied to objectively reasonable law enforcement activity. Thus, any benefit derived from excluding evidence in these situations cannot justify the substantial costs of exclusion.

The Court noted that "[t]o infer permissibly that a drug-dealer's home may contain contraband, the warrant application must connect the drug-dealing activity and the residence. Typically, this will require some "facts showing that the residence had been used in drug trafficking, such as an informant who observed drug deals or drug paraphernalia in or around the residence."[41] Further, "under the continual-and-ongoing-operations theory, we have at times found a nexus between a defendant's residence and illegal drug activity with no facts indicating that the defendant was dealing drugs from his residence." [42]

[38] See Illinois v. Krull, 480 U.S. 340 (1987).
[39] See U.S. v. McPhearson, 469 F.3d 518 (6th Cir. 2006).
[40] 468 U.S. at 922.
[41] Brown, 828 F.3d at 383."
[42] U.S. v. Gunter, 551 F.3d 472, 481 (6th Cir. 2009).

The Court held that there was a sufficient inference that since there were no drugs at the stores, which did have evidence of trafficking, it was reasonable to expect to find drugs at the home shared by the suspects. Although the evidence was not strong, "this case is about law enforcement's good-faith reliance on the warrant. And we have explained that "reasonable inferences that are not sufficient to sustain probable cause in the first place may suffice to save the ensuing search as objectively reasonable."

The Court reversed the decision to suppress the evidence found in the home search.

42 U.S.C. §1983 – SEARCH

Harris v. Klare, 902 F.3d 630 (6th Cir. 2018)

FACTS: On May 22, 2014, seventeen-year-old Harris, her parents and her sister, went to dinner at TGI Friday's. On the way home, the family's minivan was stopped by an Erlanger PD officer. Harris's mother was ultimately arrested for "obstructing a license plate, driving with no registration plates, driving with a suspended license, and possession of a forged instrument.**"** The record was unclear as to the disposition of any charges. Due to items seen in the vehicle, officers believed drug trafficking was going on and called for a drug dog. After a long wait, the dog found no drugs. During the wait, Klare needed to use the restroom and she was escorted there by Officer Klare. With her father's permission, the officer searched Harris first stating the search was necessary. Officer Klare allegedly pinched the Harris's breasts, causing bruising. (The officer indicated she'd previously found contraband in a bra.) It was also alleged that the officer had her weapon unsnapped and she put her hands on the weapon multiple times.

Harris filed a 1983 lawsuit. The district court ruled that there was sufficient reasonable suspicion to believe that there might be drug evidence in the vehicle, which allowed the prolongation of the search. Additionally, Harris consented to the search. Klare appealed.

ISSUE: Is a request to use the restroom, conditioned on consent to a search first, a coerced consent?

HOLDING: Yes.

DISCUSSION: The Court noted that Klare failed to raise the issue of the legality of the initial prolongation and, as such, the extension of the stop was to be treated as valid. The Court noted however, that the "purpose of the initial traffic stop was completed with the arrest of Harris's mother, the continued seizure of Harris was legal only if the officers had developed a reasonable suspicion of some other criminal activity." The Court had "serious doubts as to whether the officers reasonably suspected the Harris family of manufacturing or transporting contraband. In fact, the Court agreed that "Klare provides no reason to suppose that Harris's mother's alleged traffic violations made it more likely that drug activity was afoot—if anything, one would expect a drug-trafficking family to avoid fastidiously such violations for fear of discovery."

In addition, the possession of common workers' tools was not "inherently illegal or even suspicious." And even IF suspicious, the drug dog dispelled reasonable suspicion absent "some reason to question the reliability of the drug dog." Since Harris indicated she was not escorted to the restroom until after the dog had cleared the vehicle, the Court agreed a "reasonable jury could conclude that the officers did not reasonably suspect drug activity at the time of her search and that therefore she was unlawfully detained, rendering her consent to the search invalid."

The Court then looked at Klare's claim of qualified immunity. She argued that she was "unaware that the drug dog search had been completed and disclosed no drugs." (Note – she was called to the scene by the initial officers as they needed a female officer.) The Court agreed that Klare was close to the vehicle during the process and could have observed the dog search which produced no alert, and would have likely been talking to the other officers as well.

With respect to Harris's consent, she was a juvenile. She was not told, and likely was unaware, that she could refuse a search, albeit she needed to go to the restroom. Harris claimed to be unaware that she was going to be searched when she was told to "come over here" by Klare, and would likely be construed as a command, as well. There were six vehicles, and officers, at the scene, and Klare's weapon was unsnapped. Harris was held for over an hour and that negated a great deal of the voluntary nature of the interaction.

Specifically, the Court noted that:

> The length of the detention is particularly significant in light of the implicitly conditional nature of Klare's offer to escort Harris to the restroom. As Klare's deposition testimony shows, had Harris refused her consent to Klare's search, she would not have been allowed to go to the restroom. As anyone who has found themselves waiting in line for the cinema restroom at the conclusion of a movie can attest, forcing someone who has been in custody for over an hour to choose between consenting to a search and going to the restroom is one way to "apply pressure" and "intensify[] the coercive tenor of the request for consent."

The Court noted that Klare was also holding Harris's hands behind her during the search. In toto, the Court agreed, the consent was not voluntary, specifically stated that "[w]hen a minor, untutored in her Fourth Amendment rights, seized for over an hour and in the presence of numerous armed police officers, with her arms secured behind her back and facing the choice of consenting to a search or being kept from the restroom, fails to resist that officer's search of her person, a reasonable jury could find that this non-verbal consent was not voluntarily given."

The Court compared the situation to the one in U.S. v. Beauchamp, and agreed that a reasonable jury could find that Klare was not entitled to qualified immunity, and that based on Harris's account, "they could find that Klare unreasonably searched her without her voluntary consent."

The Court reversed the finding of qualified immunity.

Morgan / Graf v. Fairfield County (Ohio), 903 F.3d 553 (6th Cir. 2018).

FACTS: Morgan and Graf owned a home on a large lot; about 300 feet separated it from other homes. It included a second story balcony with no stairs. Visibility into that area was blocked by fencing and trees. Local law enforcement (the SCRAP unit) received anonymous tips that the couple was growing marijuana and cooking methamphetamine and decided to do a knock and talk.

> Five members of the SCRAP unit went to the house and, following their standard practice, surrounded the house before knocking on the door. One officer was stationed at each corner of the house, and one approached the front door. The officers around the perimeter were standing approximately five-to-seven feet from the house itself. The officers forming the perimeter could see through a window into the house on at least one side of the building.

Officers outside could see marijuana plants on the balcony. Because Graf had closed the front door (after talking to an officer), the officer demanded Graf open the door, fearing destruction of the evidence. Deputy Campbell entered, seized both Morgan and Graf, and brought them outside to await a warrant. With that, evidence was found and both were charged with state crimes. The court denied suppression motions; Morgan pled guilty and Graf was convicted. On appeal, the denial of the motion was vacated and the convictions reversed. Ohio dropped all charges on remand.

Both Morgan and Graf filed suit under 42 U.S.C. §1983 – claiming violations of the Fourth Amendment. They argued that "forming a perimeter around the house intruded on their curtilage, an area protected by the Fourth Amendment. What is more, the intrusion was not a one-time event—it was the county's policy to do so during every 'knock and talk.'" The Court dismissed their claims and they appealed.

ISSUE: Is it proper to enter a back curtilage during a knock and talk?

HOLDING: No.

DISCUSSION: The Court broke it down into two questions: "did the SCRAP unit search Morgan's and Graf's property and, if so, did that search fall under one of the exceptions to the warrant requirement?"

For the first, the Court agreed that yes, it was. Whether a part of one's property is curtilage generally involves a fact-intensive analysis that considers (1) the proximity of the area to the home, (2) whether the area is within an enclosure around the home, (3) how that the area is used, and (4) what the owner has done to protect the area from observation by passersby.[43] But

[43] U.S. v. Dunn, 480 U.S. 294 (1987).

these factors are not to be applied mechanically: they are "useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." Often that central consideration requires little more than a commonsense analysis because the concept is "familiar enough that it is 'easily understood from our daily experience.'"[44]

Under that commonsense approach, the area five-to-seven feet from Morgan's and Graf's home was within the home's curtilage. Even when the borders are not clearly marked, it is "easily understood from our daily experience" that an arm's-length from one's house is a "classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'". The right to be free of unwarranted search and seizure "would be of little practical value if the State's agents could stand in a . . . side garden and trawl for evidence with impunity." And the right to privacy of the home at the very core of the Fourth Amendment "would be significantly diminished" if the police—unable to enter the house—could walk around the house and observe one's most intimate and private moments through the windows.

But not only were the SCRAP unit members positioned on the sides of the house, they were in the backyard, too. Indeed, the backyard is where they discovered the marijuana plants, creating the injuries alleged by Morgan and Graf. And "the law seems relatively unambiguous that a backyard abutting the home constitutes curtilage and receives constitutional protection."[45] It agreed that "is true especially when, as here, there are no neighbors behind the house and the backyard is not visible from the road."

> The county mistakenly focuses its application of the Dunn analysis on the backyard balcony itself, arguing that the there is no search because the balcony was not part of the curtilage. But even if the county were correct that a backyard, second-story balcony with no outside access was not part of the curtilage, it would make no difference here, because the balcony is not what is at issue. The curtilage that the officers are said to have entered is the area surrounding the house, five-to-seven feet from the residence. Regarding that area, the county argues only two points—first that the immediate perimeter surrounding the house was not part of the curtilage because there was no fence enclosing the rear or perimeter of the house and, second, that area was not part of the curtilage because Morgan and Graf had neighbors. Those arguments are belied, however, by Dunn and Jardines and the "relatively unambiguous" conclusion this court came to 20 years ago in Daughenbaugh.

Moving to the second question, the county argued that "forming a perimeter was not unconstitutional because the officers were protecting their own safety. To be sure, officer safety can be an exigency justifying warrantless entry." However, the information they had about risk was fairly minimal and the argument that drugs and guns go together, was "no more than a

[44] Jardines, 569 U.S. at 7 (quoting Oliver, 466 U.S. at 182 n.12).
[45] Daughenbaugh, 150 F.3d at 603; see also U.S. v. Jenkins, 124 F.3d 768 (6th Cir. 1997).

general statement of correlation; and generic possibilities of danger cannot overcome the required particularized showing of a risk of immediate harm." Further, even had they known for sure he had a firearm, that is not an exigent circumstance, either.[46]

The Court continued:

> What is more, the county's position would create an exception that would swallow the rule. It might be safer for the police to enter the curtilage to form a perimeter; it would certainly be easier to stop someone who might flee by establishing some sort of barrier to that flight. Indeed, many (if not most) Fourth Amendment violations would benefit the police in some way: It could be safer for police without a warrant to kick in the door in the middle of the night rather than ring the doorbell during the day, and peering through everyone's windows might be a more effective way to find out who is cooking methamphetamine (or engaging in any illegal behavior, for that matter). But the Bill of Rights exists to protect people from the power of the government, not to aid the government. Adopting defendants' position would turn that principle on its head.

The officers argued that they were not there to do a search, but the Court noted that the subjective intent was irrelevant. Further, even though the items were openly in view on the balcony, the "plain-view exception, however, applies only when "the officer did not violate the Fourth Amendment in arriving at the place where the evidence could be plainly viewed."[47] As explained above, the SCRAP unit discovered the marijuana only after entering Morgan's and Graf's constitutionally protected curtilage. The plain-view exception does not apply."

The Court concluded that the officers' rights to enter the property were "like any other visitor" and carried the "same limits of that "traditional invitation": "typically . . . approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* Certainly, "[a] visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use." Neither can the police. By doing so here, the SCRAP unit violated Morgan's and Graf's Fourth Amendment rights."

Finally, the Court had to look to the law in place at the time, despite more recent cases that have rendered invalidating that law. Jardine*s* and, more recently, Collins made clear that outside of the same implied invitation extended to all guests, if the government wants to enter one's curtilage it needs to secure a warrant or to satisfy one of the exceptions to the warrant requirement."[48] As such, the Court ruled in favor of the individual officers, although putting on notice that the law has changed since the facts that arose in this case.

[46] U.S. v. Johnson, 22 F.3d 674, 680 (6th Cir. 1994).
[47] U.S. v. Taylor, 248 F.3d 506, 512 (6th Cir. 2001).
[48] Florida v. Jardines, 569 U.S. 1 (2013); Oliver v. U.S., 466 U.S. 170 (1984); Collins v. Virginia, 138 S. Ct. 1663 (2018)

The Court then looked to the liability of the government employer. Under "Gregory v. City of Louisville,[49] we concluded that if a challenged policy is facially constitutional, the plaintiff must show that the policy shows a deliberate indifference to constitutional rights." In this case, "It is uncontested that the county's policy required officers to enter "*onto* the back" of any property during *every* 'knock and talk.' And as acknowledged by the sheriff and members of the SCRAP unit, that policy did not give any leeway for the officers to consider the constitutional limits that they might face. The SCRAP unit did not weigh the characteristics of properties to determine what parts of the properties were curtilage (and thus off limits). The policy gave no weight to the core value of the Fourth Amendment—one's right to retreat into his or her home "and there be free from unreasonable government intrusion."[50]). Quite the opposite: the policy commanded that the SCRAP unit ignore those limits. It was not one employee's interpretation of a policy that caused Morgan's and Graf's injuries—the policy was carried out precisely as it was articulated. And so, because the county's policy itself was the cause of Morgan's and Graf's injury, the county should be held liable under Monell."[51]

The Court allowed the case to go forward.

42 U.S.C. 1983 – FORCE

Hansen v. Aper, 2018 WL 3997321 (6th Cir. 2018)

FACTS: On September 28, 2013, Officer Aper spotted Hansen speeding in Michigan. He detected the scent of marijuana and had Hansen get out of the vehicle. As Hansen stood outside, handcuffed, the vehicle was searched. Aper found drugs and a gun. Hansen was arrested and placed in the cruiser. He complained the handcuffs were too tight and Aper later stated he checked them. Aper attributed the discomfort to Hansen was leaning on them.

After the cuffs were removed 30-40 minutes later, Hansen claimed that he had indentations and that he was in visible pain, but he did not complain further. Hansen continued his trip. A few days later, Hansen went to his doctor. In ongoing treatment, Hansen was found to have a "crush injury" to the radial nerve in his right hand, and he complained of a cold and numb feeling. Hansen underwent therapy but still experienced tingling and numbness.

Hansen filed suit. He underwent a third-party examination in which that doctor found nothing that could be traced to the handcuffing incidents. Aper requested summary judgement, which the District Court denied. Aper appealed.

ISSUE: Is forceful handcuffing (that causes injuries) actionable?

HOLDING: Yes.

[49] 444 F.3d 725 (6th Cir. 2006),
[50] Collins, 138 S. Ct. at 1670 (quoting Jardines, 569 U.S. at 6).
[51] Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978).

DISCUSSION: The Court agreed that the "right to be free from "excessively forceful handcuffing" is clearly established for qualified immunity purposes.[52] The Court noted there was a test to determine if a handcuffing claim could move forward" (1) he or she complained the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced 'some physical injury' resulting from the handcuffing."[53]

The Court looked at related cases and noted that the length of time was important and the fact that that Aper allegedly "actively rebuffed' his complaints by stated that handcuffs were supposed to hurt. The Court held that Aper was not entitled to qualified immunity.

Stevens-Rucker v. City of Columbus, 739 Fed.Appx. 834 (6th Cir. 2018)(certiorari pending)

FACTS: "In the early morning hours of November 17, 2013, Ashley Cruz was awakened in her Hilliard, Ohio, apartment by a shirtless man wearing a camouflage hat and jeans. It was raining and he was soaked. He held a large kitchen knife and was clearly confused—apparently believing that he had entered his own apartment." At some point, the man (White) left and Cruz locked the door. She called 911 and officers responded. White did not have a visible weapon when they arrived, but had apparently tried to go back inside the apartment. The officers engaged at one point, used a Taser, but White popped back up. Officers could see White had knives in his pocket, and he drew one. Officers fired at him and missed. Another officer found and engaged with him, and he was shot at least once, but again fled on foot. Another officer encountered him, still holding a knife and again, fired at him. White died from multiple gun shots wounds. White was an Iraqi war veteran who suffered from mental health issues, although just a few days before he had been deemed to not be an imminent threat.

Stevens-Ricker, on behalf of White's estate, filed suit against the officers involved. The officers demanded qualified immunity, which was granted in part and denied in part. The officers appealed.

ISSUE: 1. Is shooting an armed individual, later found to have mental health issues, who erroneously believed that he was actually in his own residence excessive force?

2. Are officers deliberately indifferent by not immediately rendering medical assistance after an officer-involved shooting when it is clear that the suspect would not have survived the shooting?

HOLDING: 1. No.
2. No.

DISCUSSION: The officers looked to Graham, which provides three factors to consider with respect to claims of excessive force: 1) severity of the crime; 2) whether the suspect was resisting

[52] Kostrzewa v. City of Troy, 247 F.3d 633 (6th Cir. 2001); see also O'Malley v. City of Flint, 652 F.3d 662 (6th Cir. 2011)"
[53] Morrison, 583 F.3d at 401.

arrest or fleeing; and 3) whether the suspect posed an immediate threat to others, including the officer involved."[54] In the case of the first officer that shot White, the Court noted that the officer reasonably believed that White "had committed aggravated burglary," armed with a knife. When the officer fired, it was questionable as to whether White posed him a risk, but the court agreed that the officer had to make a split second decision as to whether White was attacking or fleeing.

With respect to the second officer, the officer who fired the fatal shots, the Court noted that the six shots were considered as three sets of two each, but the court looked at them as two sets – one of two shots and then one of four shots. The officer, McKee, fired shots that hit White in the back, but the question was whether he reasonably believed White was a danger to others at that moment? The Court agreed that the shots, while in the hazy, gray area, were sufficiently justified as to find in favor of the officers.

With respect to the latter four shots, the trial court had "granted qualified immunity to McKee for firing the first two of the four shots but denied him qualified immunity for firing the final two." The Court noted that:

> Officer McKee fired at White after the latter had stopped running. The two men were fifteen feet apart and White now faced McKee while still grasping the knife and staring "blankly" at him. McKee aimed at White's "center mass" and fired.

The Court noted that there was evidence that "the final four shots were fired in such rapid succession that they constituted a single event" – rather than two separate events. (All six shots were fired within an 8-10 second span of time.) The Court agreed there "was not enough time for Officer McKee to stop and reassess the threat level between the shots. He continued to use his firearm to stop what he justifiably perceived as an immediate threat to his safety."

The Court agreed that Officer McKee was entitled to qualified immunity and ruled in his favor.

The Estate also argued that the officers failed to provide sufficient medical aid and the officers acknowledged that they did not provide any particular type of assistance because they believed that medics that had been called would be arriving quickly. They further believed that any effort was futile. The officers did not face a danger to themselves at the time, but neither did they ignore his medical condition. The Court agreed that "however, this attention does not require the officer to intervene personally. Imposing an absolute requirement for an officer to do so ignores the reality that such medical emergency situations often call for quick decisions to be made under rapidly evolving conditions. So long as the officer acts promptly in summoning aid, he or she has not deliberately disregarded the serious medical need of the detainee even if he or she has not exhausted every medical option." The Court agreed that the officers were entitled to qualified immunity on that claim, also.

The Court ruled in favor of the officers on all claims, and the local government as well.

[54] Graham v. Conner, 490 U.S. 386 (1989).

Osberry v. Slusher (and others), 2018 WL 4360979 (6th Cir. 2018)

FACTS: According to Osberry, on August 10, 2016, Lima (OH) officers, Slusher, Montgomery and Frysinger were on patrol. Osberry drove to her friend's house and parked. Officers approached her on foot with weapons drawn. Osberry told the officers she was there to pick up her niece and nephew. Officer Frysinger opened the car door and forcibly extracted her, and with Officer Montgomery assistance, threw Osberry against the vehicle. She told the officers she was pregnant. Officer Slusher assisted in restraining Osberry and tased her in the stomach.

The officers claimed that they were there to investigate an active crime scene, involving a barricaded subjected, and that Osberry became belligerent when she was told to leave. A video indicated that only seconds elapsed before the officers engaged. The Court noted that "throughout this encounter, the video shows several vehicles passing and people riding bicycles nearby."

Osberry was charged with resisting arrest, obstructing official business and disorderly conduct. All charges were soon dismissed. Osberry filed suit, and the officers a motion for judgment on the pleadings. No discovery had taken place, but a citizen generated video was provided with the motion. The district court dismissed a few claims, but declined to dismiss the most serious ones. The officers appealed.

ISSUE: May video be used to prove (or disprove) one side of a version of the facts?

HOLDING: Yes.

DISCUSSION: At this stage, the Court must take all statements made by Osberry as true, and noted the video did not so "blatantly and conclusively contradict" the allegations to negate her claims. The Court noted that the "video does not necessarily show an "active crime scene" or "a barricaded subject." There are no police vehicles, no caution tape, and no blockades or barriers visible in the video that would suggest that Osberry was in an active crime scene. Indeed, the presence of other individuals and vehicles, including several people riding bicycles nearby, would suggest the opposite. And while the presence of many police officers may suggest an ongoing investigation, as could Officer Frysinger instructing Osberry that "you need to leave this is a crime scene," these facts alone do not "utterly discredit" Osberry's version of the arrest.

The Court also noted that she had shown previous incidents where Lima officers had used the same tactics to "overwhelm and intimidate suspects." As such, the Court held that Osberry's case could go forward.

The Court concluded that Osberry has sufficiently pleaded claims for unlawful arrest, excessive force, assault, and a Monell claim. Thus, the motion for judgment on the pleadings was reversed as premature.

42 U.S.C. 1983 – MALICIOUS PROSECUTION

Bunkley v. City of Detroit, Michigan, 902 F.3d 552 (6th Cir. 2018)

FACTS: Bunkley was arrested, charged and ultimately convicted in a Detroit attempted murder. Bunkley, however, did not commit the crime, and investigators had strong evidence that he was not involved. (Initially, there was circumstantial evidence that Bunkley was.) Bunkley provided exculpatory evidence to the primary investigator (Moses) but the detective did not follow up with that evidence and claimed not to have seen it until the day of trial. Moses did, however, provide false information to the prosecutor in support of charging Bunkley with the crime, evidence that she knew was untrue. Further, at trial, Moses testified falsely as to that evidence, negating its value.

Bunkley was convicted. After post-conviction proceedings, his conviction was vacated and he was released. He had spent two years in prison. He filed suit against investigators and the prosecutor, arguing failure to intervene (against the officers) and malicious prosecution. The defendants moved for summary judgement, which was denied. The defendants appealed.

ISSUE: May an officer's assertions and providing of information to the prosecution lead to a malicious prosecution claim?

HOLDING: Yes.

DISCUSSION: Moses argued that she did not make the decision to prosecute, but the Court determined that she strongly participated in and influenced the decision to do so. Moses provided all of the relevant evidence, and failed to provide any of the exculpatory evidence. The Court agreed that was enough to allow the claim to go forward and upheld the denial of summary judgement on that issue.

With respect to the false arrest and failure to intervene claims, the Court agreed that the officers who participated in the arrest, or failed to prevent an arguably unlawful arrest, could also not be given summary judgement. The Court noted that officers are not "are necessarily entitled to qualified immunity merely because they were 'simply following orders.'" It does not say anything like that. Instead, it describes a situation in which "reasonable officers" could conclude that they have probable cause for an arrest based on "plausible instructions" from a supervisor when "viewed objectively" in light of their own knowledge of the surrounding facts and circumstances. That did not happen here." (In fact, they allegedly arrested Bunkley for a "probation violation" – even though they knew that was not the case.)

Specifically, the "arresting officers here—Dennis, Tanguay, and Washington (and Lucas)—knew that they had not investigated the Knox shooting at all, knew that Knox and Bunkley did not reasonably match the descriptions that Ainsworth had given them, knew that they did not question Bunkley (or Knox) before arresting Bunkley, and knew that Bunkley did not have a probation violation (their asserted reason for arresting him). They identified Bunkley, left the

room to call Lucas, and returned to arrest Bunkley. Any of these officers had time to stop, intervene, and prevent this arrest-without-probable-cause."

The Court affirmed the denial of qualified immunity.

Wilson v. City of Shaker Heights, 741 Fed. Appx. 312 (6th Cir. 2018)

FACTS: The Minkowetzes lived next to Wilson. Wilson believed that the couple were vandalizing her property and antagonizing her. To "fight back," Wilson posted signs in her window facing the Minkowetzes's property that were derogatory and in some cases, nonsense. The Minkowetzes complained; Officer Dunn responded to investigate. Officer Dunn made a report to the local prosecutor, who several months later, issued a warrant for disorderly conduct against Wilson. Ultimately, the charges were dismissed.

Wilson filed suit against Officer Dunn and the prosecutor, claiming malicious prosecution. The Court found in favor of Officer Dunn and the prosecutor, and Wilson appealed.

ISSUE: Must a person be involved in the actual decision to prosecute to be sued under malicious prosecution?

HOLDING: Yes.

DISCUSSION: The Court began:

> First, the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute. Second, because a § 1983 claim is premised on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution. Third, the plaintiff must show that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty, as understood in our Fourth Amendment jurisprudence, apart from the initial seizure. Fourth, the criminal proceeding must have been resolved in the plaintiff's favor.[55]

The Court noted that, with respect to Dunn, he "could not have 'made, influenced, or participated in the decision to prosecute' because Dunn merely relayed the facts of his investigation to Keller, leaving Keller to make the decision to prosecute." As such, the Court agreed, Wilson could not be successful in her claim.

After resolving other issues, the Court held that the matter had been properly dismissed.

TRIAL PROCEDURE / EVIDENCE

[55] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010)

TRIAL PROCEDURE / EVIDENCE – CONFRONTATION CLAUSE

Issa v. Bradshaw (Warden), 904 F.3d 446 (6th Cir. 2018)

FACTS: Miles was involved in the murder for hire of two men. It was believed that Issa, an employee at the location where the homicides had taken place, had hired the two men to commit the crime, at the behest of the wife of one of the two murdered men. All of the men involved in the plot, were convicted, but only Issa, the intermediary, received a death sentence. (The wife was charged, but acquitted.) At Issa's trial, Miles refused to testify because his immunity, in place during the wife's trial, had been revoked for Issa's trial. The Court did allow the out-of-court statements made by two witnesses, to whom Issa admitted the crimes.

Issa appealed.

ISSUE: Must an indication as to motive to lie be allowed to be shown to the jury?

HOLDING: Yes.

DISCUSSION: Issa argued, among other issues, that Miles' out-of-court statements were improperly admitted through witnesses in violation of the Confrontation Clause. The Court looked at the case, which was pre-Crawford[56] and thus decided under Ohio v. Roberts.[57] The Court held that Crawford is not retroactive. Under Roberts, the Court must determine that the witness was unavailable (undisputed as Miles refused to testify) and had a sufficient "indicia of reliability." The Court extensively reviewed the factors to be considered in making that determination, including the fact that the speakers were good friends of Miles, and were not made in a context that would suggest he was trying to shift any blame to Issa. However, other factors indicated that Miles liked the brag but said he never spoke to the witnesses about the murders.

As the statements were the only direct link between Miles, who was proven to have actually pulled the trigger, and Issa, the Court held the statements were improperly admitted.

The Court vacated Issa's conviction.

FIRST AMENDMENT

McGlone / Peters v. Metropolitan Government of Nashville, 2018 WL 4502283 (6th Cir. 2018)

FACTS: The Nashville Pride festival was held in a public park in 2015. The festival obtained a proper permit and a security plan was approved. It was a ticketed event and the area was

[56] Crawford v. Washington, 541 U.S. 36 (2004).
[57] 448 U.S. 565 (1980)

secured, but the permitted area extended beyond that, into the "sidewalk plaza near the fountains" within the park.

McGlone and Peters regularly preached at any event at which homosexuality was discussed as they believe such activity was sinful. Prior to the Pride Festival, they communicated to Lt. Corman of their intent and were told they would need to remain on the other side of a street identified in the communication. On the day in question, they went to the sidewalk area and were quickly confronted by an off-duty officer hired as security for the festival. That officer told them that they were "not allowed to be in the sidewalk area" and faced arrest unless they left. They retreated across the street and continued to preach, but later stated that their message was "interfered with by "deflection" and the noise of passing traffic."

McGlone and Peters filed in arguing a violation of their First Amendment rights. The District Court ruled in favor of Nashville and the two men appealed.

ISSUE: Does strict scrutiny apply in cases of First Amendment denial of speech?

HOLDING: Yes.

DISCUSSION: The Court began:

> Three inquiries guide courts in ascertaining whether First Amendment free speech rights have been violated: (1) whether the allegedly excluded speech is protected under the First Amendment; (2) the nature of the forum in which the speech was to take place; and (3) whether the government's exclusion is justified under the requisite standard.[58] The parties agree that the First Amendment protects McGlone and Peters' speech and that the sidewalk area in question is a traditional public forum. The question in this case is whether Nashville's exclusion of the preachers from Public Square Park can be justified under the applicable level of constitutional scrutiny.

The Court continued:

> We review restrictions of protected speech in a traditional public forum using one of two standards.[59] If the restriction is content based, then we apply strict scrutiny, and the restriction survives only if it is "narrowly tailored to be the least- restrictive means available to serve a compelling government interest."[60] If instead the restriction is a content-neutral regulation of the time, place, and manner of speech, then we evaluate it under an intermediate scrutiny standard, asking whether the restriction is "narrowly tailored to serve a significant government interest, and leave[s] open ample channels of communication." McGlone and Peters say our scrutiny of Nashville's actions should be strict, Nashville argues that it should be intermediate.

[58] See Cornelius v. NAACP Legal Defense and Educ. Fund., 473 U.S. 788 (1985); see also Saieg, 641 F.3d at 734-35.
[59] Saieg, 641 F.3d at 733-35.
[60] Bible Believers v. Wayne Cty, 805 F.3d 228(6th Cir. 2015).

In this case, because the restriction was content-based, strict scrutiny applies. Although Nashville argued otherwise, in its own first argument, it noted that the speech was problematical. "Nashville's explanation leaves no doubt that but for the anti-homosexuality message that McGlone and Peters were advancing as they stood on the sidewalk, they would not have been excluded." The two preachers sought only to speak, and their message did not alter the speech of the festival itself.

The Court noted that "the preachers did not "in any way hinder[]" the Pride Festival's message except by disturbing a desired 'safe space' by being physically present within the permitted area—though outside the ticketed area—and vocally disagreeing with the Pride Festival's message." Further, "Nashville's exclusion of McGlone and Peters was a content-based restriction of speech in a traditional public forum. Strict scrutiny, then, is the proper standard for our review."

The Court held that excluding the two men violated their First Amendment rights.

As to whether the municipality was liable, the Court agreed that Nashville's involvement in approving and enforcing the security plan, and specifically, Lt. Corman's involvement, as the official in charge of such special events for the police department, was sufficient to put liability on the city.

The Court upheld the decision in favor of McGlone and Peters.

EMPLOYMENT

Hostettler v. College of Wooster, 895 F.3d 844 (6th Cir. 2018)

FACTS: Hosteller accepted employment with the College of Wooster when she was four months pregnant. Consistent with policy, she was allowed to take 12 weeks unpaid maternity leave, even though she did not was not entitled to do so under FMLA as yet. As the time approached for her to return to work, however, she experienced "severe postpartum depression and separation anxiety." Her doctor suggested that she work a reduced, part-time, schedule temporarily until they could get her symptoms under control. She was to work half-days for a month, taking her over two months past her approved maternity leave.

Reportedly, if she had to work past noon, her scheduled departure time, she would have panic attacks and be unable to function. She could, however, do everything required in her position and she handled many duties from her home, which included answering email. In her last evaluation, in the summer of 2014, she was given a positive assessment. However, her supervisor felt the modified schedule put a strain on the rest of the department and that some work was left undone. Conversations concerning her return to full-time status ensued, but Hostettler's doctor updated her medical certification to keep her on half-time work for several months.

(Hostettler indicated she'd asked to extend the time to what would have been effectively a 30 hour work week.)

In July 2014, Hostettler was terminated for her inability to return to full-time work. Temporary clerical help was retained, but a replacement was not hired for several more months, until the middle of fall. Hostettler filed suit, claiming violations of the ADA, FMLA and sex discrimination law. The District Court found that full-time status was an essential function and dismissed the case. Hostettler appealed.

ISSUE: Must a disability assessment be fact-intensive?

HOLDING: Yes.

DISCUSSION: The Court noted that in this case, the "direct test" of evaluating a disability case was the appropriate one to use. In such cases, the Court must look at three factors: Under the direct method of proof the plaintiff must show "(1) that she is an individual with a disability, and (2) that she is otherwise qualified for her job despite the disability (a) without accommodation from the employer; (b) with an alleged 'essential' job requirement eliminated; or (c) with a proposed reasonable accommodation."[61]

The Court agreed, first, that Hostettler's condition was a disability and that the ADA is intended to be broadly construed on that issue. Even though her condition was episodic, it was no less impairing. And, the Court noted, although "in-person attendance" on a regular basis is an essential function of most jobs, it is "not unconditionally so." To determine it, the court must "perform a fact-intensive analysis." Hostettler clearly could perform all the core tasks inherent in her position, and she had, according to an affidavit from a colleague, completed all tasks required in a professional and timely manner. Even the supervisor who fired her agreed, having reviewed her work and found it satisfactory during the same time frame.

The Court agreed that it was essential that Wooster "explain *why* Hostettler could not complete the essential functions of her job unless she was present 40 hours a week." The Court noted that "full-time presence at work is not an essential function of a job simply because an employer says that it is. If it were otherwise, employers could refuse *any* accommodation that left an employee at work for fewer than 40 hours per week. That could mean denying leave for doctor's appointments, dialysis, therapy, or anything else that requires time away from work. Aside from being antithetical to the purpose of the ADA, it also would allow employers to negate the regulation that reasonable accommodations include leave or telework."

The Court also noted that since the employer treated her as an eligible FMLA employee, even though she was not, that it was estopped from any claims on that issue. The Court reversed the District Court's and remanded the case.

[61] Ferrari v. Ford Motor Co., 826 F.3d 885(6th Cir. 2016). Monette v. Elec. Data Sys. Corp., 90 F.3d 1173 (6th Cir. 1996) (abrogated by Lewis v. Humboldt Acquisition Corp., 681 F.3d 312 (6th Cir. 2012) (en banc)).

Henderson v. City of Flint, 2018 WL 4520012 (6th Cir. 2018)

FACTS: Henderson argued that she was fired from her public position because she requested an investigation into the unethical activities of Flint's Mayor, Weaver. At the time, the city was under a receivership; Henderson was appointed as City Administrator during the time the city was transitioning back to a more normal government structure. At the time, the position was appointed at the pleasure of the mayor.

In late 2015, in response to Flint's water crisis, the Mayor established a nonprofit to handle donations intended to assist residents. There was a second nonprofit established by other parties. Henderson was told to "direct potential donors" to the fund established by the Mayor. At that point, she contacted the city's legal advisor, who had notified the state ethics board.

In February 2016, Weaver fired the police and fire chiefs, and Henderson. Weaver claimed the firing was due to Henderson not informing her in a timely manner about a disease outbreak, but Henderson later testified she had informed Weaver about it, and emails supported she had done so. The legal advisor was fired as well, and eventually settled with the City.

Henderson filed suit, claiming First Amendment retaliation and related claims. The Court ruled in favor of Flint, and Henderson appealed.

ISSUE: Are government employees covered by the First Amendment?

HOLDING: Not necessarily

DISCUSSION: Henderson argued she was terminated because she requested an investigation into the Mayor's actions. "To prevail on her First Amendment retaliation claim, Henderson must demonstrate three elements: "(1) [she] engaged in constitutionally protected conduct; (2) an adverse action was taken against [her] that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by [her] protected conduct."[62] The determination of whether a public employee's speech occurred in her capacity as a private citizen is a question of law.[63]

To begin, the Court noted that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[64] If Henderson was not "speak[ing] as a 'citizen,'" she did not engage in constitutionally protected speech. In other words, to prevail on her First Amendment claim, Henderson must demonstrate that her communication with Chubb did not occur as part of her official duties."

[62] Handy-Clay v. City of Memphis, 695 F.3d 531 (6th Cir. 2012) (quoting Fritz v. Charter Twp. of Comstock, 592 F.3d 718 (6th Cir. 2010))."
[63] Mayhew v. Town of Smyrna, 856 F.3d 456 (6th Cir. 2017)."
[64] Garcetti v. Ceballos, 547 U.S. 410 (2006).

In determining if her job included an expectation that she would report such behavior, it noted that Henderson was responsible for the day to day operations of the City, including its finances. But, the Court continued, "in the absence of any express investigative or watchdog duties, we decline to conclude that these general statements are alone sufficient to demonstrate that Henderson's report to Chubb necessarily occurred within her official duties." She directed the concern to Chubb because of his status, through her normal email account. She asked him specifically to initiate an investigation and protect employees from retaliation. Her response "bore all the markers of official action."

As such, the Court held, her reported was not protected speech under the First Amendment. However, the Court further held that her state whistleblower claim could prevail as it did not have the same standards as a First Amendment claim.

TABLE OF CASES